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I N D E X

			Re-	Re-	By
<u>Witnesses:</u>	<u>Direct</u>	<u>Cross</u>	<u>direct</u>	<u>cross</u>	<u>Examiner</u>

(None presented.)

E X H I B I T S

<u>Number</u>	<u>For Identification</u>	<u>In Evidence</u>
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(None marked.)

1 CHAIRMAN HURLEY: This is a special open
2 meeting of the Illinois Commerce Commission pursuant
3 to previous notice.

4 We have available today in Chicago
5 Commissioners Lieberman, Wright, O'Connell-Diaz, Ford
6 and Hurley. Obviously, we have a quorum. I don't
7 think anybody wanted to miss this one, and we can
8 proceed.

9 This is an oral argument in Docket
10 No. 05-0159, which is Commonwealth Edison Company,
11 and 05-0160, et al., which is a consolidated Ameren
12 Companies. These are proposals implementing
13 competitive procurement process by establishing Rider
14 CPP, Rider PPO.

15 I'll give you a copy of this. We all
16 know why we're here. We're here because we have
17 before us a motion to dismiss filed by the People of
18 the State of Illinois, the Cook County State's
19 Attorney, the Citizens' Utility Board, The
20 Environmental Law and Policy Center in the
21 Commonwealth Edison case, and I think in the Ameren
22 cases all those parties, save Cook County. All the

1 same parties.

2 So there is a motion to dismiss.

3 There have been filings pursuant thereto. And the
4 Commission in its infinite wisdom decided to hold an
5 oral argument to hash out the issues in the motions
6 to dismiss, which we did about a week ago.

7 And we have ten parties or I shouldn't
8 say that. We have ten presenters today. Ten people
9 have suggested that they would like to be heard by
10 the Illinois Commerce Commission on this issue.

11 So that everybody knows who's going to
12 be presenting, I have a list here. On behalf of the
13 Attorney General and the proponents of the motion, we
14 have Benjamin Weinberg, from the Attorney General's
15 Office.

16 Since a lot of us don't know you, why
17 don't you just raise your hand and introduce
18 yourself. Welcome to the Commission.

19 MR. WEINBERG: Thank you.

20 CHAIRMAN HURLEY: On behalf of Commonwealth
21 Edison the presentation will be by E. Glenn Rippie.

22 On behalf of the Ameren Companies, we

1 have Chris Flynn.

2 On behalf of the Staff of the ICC, we
3 have Carmen Fosco.

4 On behalf of Constellation New Energy,
5 MidAmerican Energy Company, Peoples Energy Services
6 and US Energies Savings Corporation, we have
7 Christopher Townsend.

8 On behalf of Locals 1551 and 702 The
9 International Brotherhood of Electrical Workers, we
10 have Christopher Hexter.

11 Midwest Independent Power Suppliers,
12 the Electric Power Supply Association will be
13 represented today by Freddie Greenberg.

14 The Building Owners and Managers
15 Association of Chicago will be represented by Patrick
16 Giordano.

17 And the Illinois Energy Association
18 will be represented by Mr. Jim Monk.

19 And finally, the Constellation Energy
20 Commodities Group will be represented by Myra
21 Karegianes.

22 I'm told by Michelle Mishu (phonetic)

1 who put this together for the Commission that each
2 presenter participating in oral argument will be
3 allowed 15 minutes for their presentations to the
4 Commission. And you may reserve, prior to that time
5 for rebuttal. I think rebuttal, for anybody who
6 wants it, will go pretty much in the same order.

7 If we are ready, the first
8 presentation is on behalf of the proponents on the
9 motion to dismiss, and that presenter is Benjamin
10 Weinberg from the Attorney General's office.

11 I would like to ask an opening
12 question, if you don't mind, and I'm sure you don't.
13 Because the question -- I'm really posing the
14 question to all the participants here to try to at
15 least touch on, in your presentation to the
16 Commission.

17 The first question, it's compound.
18 It's a compound question. We have a process here at
19 the Commission, which we call the post-2006 process.

20 I would like to know from the various
21 presenters whether this issue was raised in that
22 process, and how -- what the outcome of the issue was

1 in that process. And as an offshoot, I'd like you to
2 do a little statutory interpretation for me:

3 What did the legislature intend when
4 they gave the Commission the '96 or, if you will, the
5 '97 Act? What did the legislature intend for the
6 Commission to do at the end of the rate freeze?

7 So it's kind of a compound question,
8 but I would like everybody to touch on that in your
9 presentations.

10 Having said that, it's all yours
11 Mr. Weinberg.

12 MR. WEINBERG: Thank you, Mr. Chairman.

13 CHAIRMAN HURLEY: Sure.

14 MR. WEINBERG: Members of the Commission,
15 Mr. Chairman, my name is Benjamin Weinberg. I'm
16 chief of the Public Interest Division of the Attorney
17 General's Office.

18 COMMISSIONER O'CONNELL-DIAZ: Mr. Weinberg,
19 could you speak into the microphone because I think
20 the people in the back can't hear you.

21 CHAIRMAN HURLEY: I didn't even check. Are we
22 connected with Springfield, and can you hear us down

1 there?

2 SPRINGFIELD: Yes. The presenter needs to
3 speak into the microphone.

4 MR. WEINBERG: Is that better?

5 CHAIRMAN HURLEY: That's good.

6 MR. WEINBERG: Mr. Chairman, let me answer your
7 first question or at least the first part of it
8 immediately.

9 And I'll do it this way: The issue
10 before the Commission today is whether the Commission
11 has authority to, let's just call it, bless the
12 auction. All right.

13 Now, in the post-2006 final staff
14 report, the Staff suggested -- proposed that, quote,
15 "The Commerce Commission should clarify its authority
16 to implement the use of any procurement methodology
17 in general at a vertical auction in particular."

18 Now, I believe where this came from is
19 several comments that ComEd's general counsel and
20 also BOMA's counsel had made on the record. And I'll
21 quote ComEd's counsel, which was counsel's statement
22 on this direct issue, which I believe the general

1 counsel had referred to in his November 23, 2004
2 letter.

3 His statement is with respect to the
4 following issue -- this was submitted in a memorandum
5 that addressed this. It was, quote: "The ICC has
6 authority under existing law to approve a tariff that
7 passes through the customers the costs incurred by a
8 utility to procure electricity through a competitive
9 procurement process." In other words, this was
10 ComEd's argument.

11 Along with that counsel for ComEd
12 stated that, and I quote: "This is not a consensus
13 item, and should be viewed as an opinion of
14 Commonwealth Edison which was not discussed in PWG,
15 the Procurement Working Group meeting."

16 Similarly, counsel for BOMA submitted
17 it in writing, a statement, disagreeing with ComEd's
18 counsel that it was authorized. But, again, agreeing
19 that it had never been discussed in the working
20 group.

21 Therefore, this is, we believe, the
22 first time that this matter is being taken up. Just

1 so I can clarify, I'm appearing today in addition to
2 appearing on behalf of Attorney General Madigan and
3 the People of the State of Illinois, I'm also
4 appearing on behalf of Cook County State's Attorney
5 Office, CUB, and The Environmental Law and Policy
6 Center.

7 I will be presenting our main argument
8 with respect to our petition for interlocutory
9 review, which asks the Commission to review and
10 reverse the ALJ's rulings.

11 Now, I'll also be relying on, as the
12 Commission directed, I will be relying on the
13 representatives of the joint filers for responding to
14 questions as necessary. They will be able to submit
15 what the Commission called supplemental responses.

16 Now, I think the appropriate starting
17 point for me this morning or afternoon is to note
18 that it's particularly appropriate for the Attorney
19 General's Office to be here because in 1997 when the
20 General Assembly passed the Customer Choice Law, it
21 created within the Attorney General's office a
22 consumer's Utility Unit. And the General Assembly

1 specifically providing in amending the Attorney
2 General's Act as part of that amendment --

3 COMMISSIONER O'CONNELL-DIAZ: Mr. Weinberg, are
4 you suggesting that there was no Public Utilities
5 Commission at the Attorney General's office prior to
6 1997?

7 MR. WEINBERG: No. There has been a Public
8 Interest Bureau for quite some time, but the General
9 Assembly created a Consumer Utility Unit for a
10 specific purpose. And the specific purpose of that
11 was that the health, welfare and prosperity of all
12 Illinois citizens and the public's interest in
13 adequate, safe, reliable cost-effective electric and
14 telecom services requires effective public
15 representation by the Attorney General to protect the
16 rights and interest of the public in the provision of
17 all elements of electric and telecom service both
18 during and after the transition to a competitive
19 market, and that to ensure that the benefits of
20 competition in the provisions of both electric and
21 telecom services to all consumers are attained.

22 Now, in performing the Attorney

1 General's duties prescribed by General Assembly as
2 well as her responsibilities as the chief legal
3 officer for the State of Illinois, the Attorney
4 General, Lisa Madigan, has determined that the Public
5 Utilities Act does not authorized the ICC to approve
6 market rates for customers whose service has not been
7 declared competitive; therefore, we are asking the
8 Commission to reject ComEd's requests for approval of
9 Rider CPP and Ameren's request for approval for
10 Riders BGS, BGS-L, D and M, V.

11 CHAIRMAN HURLEY: I have to throw a question in
12 here at this point because you're asking the
13 Commission to dismiss the dockets. And the ALJs, as
14 we know, said no to that.

15 What happens to the tariffs if we were
16 to be so inclined, what happens to the tariffs?

17 MR. WEINBERG: Well, I think there is a
18 common-sense answer to that, which is one of two
19 things; either the Commission can reject the tariffs
20 rather than officially dismissing them or you can
21 dismiss them, and I'm confident that the utilities
22 would withdraw the tariffs; otherwise, there would be

1 a need to resort to -- quickly end the litigation on
2 it.

3 CHAIRMAN HURLEY: I hear you. All right.

4 Thank you.

5 MR. WEINBERG: Before you can turn to the
6 specific statutory instruction, though, I have to
7 raise two objections for the record.

8 First, we object to the scope of the
9 argument.

10 Last week the Attorney General sought
11 clarification of the scope. And the Commission
12 clarified saying that this argument is on the motion
13 to dismiss.

14 However, our position is that this
15 argument is on our petition for interlocutory review.
16 We raise one issue -- the joint filers raised one
17 issue on that; and that is, whether the Commission
18 has authority under the Act to approve market-based
19 rates for customers whose service has not been
20 declared competitive.

21 The statutory construction of the
22 relevant sections is the only issue before the

1 Commission. Therefore, we object to any parts of the
2 oral argument that address issues beyond the subject
3 of this interlocutory appeal.

4 Second, we also object to the lack of
5 notice as to arguments that are going to be presented
6 by any of the ten presenters today that did not file
7 a response to our petition for review.

8 Half of the parties, I believe, that
9 are going to argue today have not filed responsive
10 pleadings to the petition for interlocutory review.
11 This is an oral argument on the petition for
12 interlocutory review. And we have not received any
13 notice of what those parties are saying in response
14 to our petition. And we believe that that violates
15 basic concepts of due process.

16 COMMISSIONER O'CONNELL-DIAZ: Mr. Weinberg, in
17 your petition, did you not ask for expedited
18 treatment of this due to the fact that there is a
19 pending matter before the Commission which is really
20 taxing all the participants' time and energies and
21 monies and circumstances?

22 MR. WEINBERG: Yes. We did ask for expedited

1 review. And a number of the parties filed a
2 responses to our petition. Those who did not, we
3 believe, should not be permitted to argue.

4 CHAIRMAN HURLEY: I'm going to note the
5 objections.

6 MR. WEINBERG: Thank you, Mr. Chairman.

7 So the issue, obviously, is whether
8 the Act authorizes the Commission to approve
9 market-based rates for services not been declared
10 competitive.

11 The Attorney General and joint filers
12 have determined that Section 103-C of the Act
13 authorizes market-based rates only for service that
14 has been declared competitive.

15 Now, in response to this argument the
16 utilities and others claim that they're not seeking
17 automatic approval of market rates, but only approval
18 of a methodology for establishing the cost of
19 procuring electricity.

20 But they can't avoid the reality that
21 these riders will establish market rates that
22 customers will have to pay. These rates will be

1 preapproved and would be passed on to customers
2 automatically.

3 Now, they're denials that they are
4 seeking market rates that will automatically be
5 passed through are refuted by admissions of several
6 high-ranking ComEd and Exelon officials whose
7 testimony is in the record; Ms. Moller and Mr. Clark.
8 They confirm that the riders will establish
9 quote/unquote market rates under which, quote:
10 "Customers would be paying prices determined by the
11 operation of the wholesale market." Close quote.

12 A footnote on Page 2 of our petition
13 lays out other testimony to the similar effect.

14 The problem with that is that
15 Section 103-C of the Act authorizes these market
16 rates only for service that has been declared
17 competitive. It's a bright-line standard. Service
18 has either been declared competitive or it hasn't.
19 And the market-based rates cannot be charged for
20 services that have not been declared competitive.
21 That's what the law says.

22 But the law makes sense. It makes

1 sense because the customers of services who have not
2 been declared competitive, we call captive customers
3 would lose most or perhaps all of the consumer
4 protections afforded by the Act if rates are set
5 automatically by the market rather than through a
6 process of regulatory review by the Commission.

7 COMMISSIONER O'CONNELL-DIAZ: Mr. Weinberg,
8 what makes up the totality of the rate that ComEd
9 will be charging its customers? What other parts?

10 MR. WEINBERG: What makes the procurement in
11 the transmission the delivery?

12 COMMISSIONER O'CONNELL-DIAZ: What are the
13 other components?

14 MR. WEINBERG: I will rely on some of my public
15 utilities experts for all of the details of that.

16 COMMISSIONER O'CONNELL-DIAZ: Isn't the price
17 of electricity one of the components of the rate?

18 MR. WEINBERG: Of course it is.

19 COMMISSIONER O'CONNELL-DIAZ: And that total
20 package is the cost?

21 MR. WEINBERG: Right.

22 COMMISSIONER O'CONNELL-DIAZ: You would agree

1 with that, correct?

2 MR. WEINBERG: The total package is the cost.
3 The cost to whom?

4 COMMISSIONER O'CONNELL-DIAZ: What percentage
5 of what you are suggesting are the market-based rates
6 that would be arrived at pursuant to the auction,
7 what percentages of that -- is that for the rate for
8 the individual customers?

9 MR. WEINBERG: I don't know the exact rate,
10 your Honor.

11 CHAIRMAN HURLEY: Go ahead.

12 MR. WEINBERG: Now, all parties agree that
13 retail competition for the relevant services has not
14 emerged or developed since 1997. There is no retail
15 competition. But without such retail competition,
16 without the price constraining retail competition --

17 CHAIRMAN HURLEY: Are you talking about the
18 residential?

19 MR. WEINBERG: Correct. Residential.

20 The Act does not permit exposing those
21 customers to the risks inherent in the wholesale
22 market.

1 But here the ALJ rulings fundamentally
2 misinterpret Section 103 of the Act. And they do
3 that by ignoring that the economy set forth in 103-C,
4 which distinguishes customers between customers who
5 take service which has not been declared competitive,
6 and customers who do not access to service that has
7 been declared competitive.

8 So the problem is that the
9 interpretation of 103-C presented in the ALJ rulings
10 expands the reads of the section to authorize use of
11 the market-based prices to automatically establish
12 rates for customers who do not have access to service
13 that has been declared competitive.

14 But when the Act was amended in '97,
15 the General Assembly developed criteria to determine
16 whether there was sufficient competition to declare
17 electric service competitive. And they authorized
18 the Commission to approve market-based rates for
19 service that meet those criteria.

20 The idea was that the self-generating
21 regulatory force of the market would automatically
22 set rates where there is sufficient price

1 constraining retail competition. But the General
2 Assembly wanted retained regulated rates for services
3 that do not yet meet the criteria to declare it
4 competitive.

5 So under the Act, in the absence of
6 retail competition, rates must continue to be
7 determined by the Commission through a process of
8 regulatory review defined by the Act rather, rather
9 than as is being proposed in the riders than by
10 automatically passing through the prices from the
11 wholesale markets.

12 CHAIRMAN HURLEY: How do you do that when the
13 company has spun-off their generation pursuant to the
14 legislation?

15 MR. WEINBERG: Well, the problem is --

16 CHAIRMAN HURLEY: You have to go back to my
17 original question.

18 MR. WEINBERG: Sure.

19 CHAIRMAN HURLEY: What did the legislature
20 intend for the Commission to do come 2007?

21 MR. WEINBERG: There are, obviously, a bundle
22 of assumptions built into the Act. There are a

1 bundle of assumptions built into the Act. But there
2 is also the language of the statute. And if has come
3 to pass that not all of the assumptions had been
4 borne out, the language is still the language.

5 The Act gave the utilities the option
6 of spinning off generation. It didn't require them.
7 It gave them the option.

8 Well, it turns out that in those years
9 since then, retail competition has not developed.
10 The retail competition that the General Assembly
11 intended would constrain, would constrain pricing on
12 the retail side to protect from the risk of
13 subjecting the customers to the risks of the
14 wholesale market.

15 So they said you can spin off. The
16 General Assembly said you can spin off. The General
17 Assembly said, But there needs to be -- in order to
18 ultimately charge market rates that would
19 automatically be passed through to customers, in
20 order for you to have that, you have to have a retail
21 competition. Well, we haven't got the retail
22 competition.

1 COMMISSIONER O'CONNELL-DIAZ: Mr. Weinberg, are
2 you suggesting that the company should not have
3 divested themselves for the generating --

4 MR. WEINBERG: I'm not saying whether they
5 should or should not have. But the law is what the
6 law is.

7 And the statute says that they cannot
8 charge market rates for services that haven't been
9 declared competitive.

10 The fact that --

11 COMMISSIONER O'CONNELL-DIAZ: The one provision
12 that you're citing?

13 MR. WEINBERG: Right.

14 COMMISSIONER O'CONNELL-DIAZ: You're only
15 citing 116, 103-C.

16 MR. WEINBERG: No, the statute, obviously, it
17 has to be read as a whole. 111(i) also supports our
18 construction as we argued in the brief.

19 But the fact that everything has not
20 worked out as the General Assembly intended doesn't
21 permit the Commerce Commission to rewrite the Act and
22 change it to fit the circumstances.

1 The law is what the law says. And the
2 law says that you cannot pass through market rates
3 automatically to customers whose service has not been
4 declared competitive.

5 So we're asking the Commission to
6 reject the ALJ's erroneous interpretation of the Act,
7 reverse the ALJ's rulings and reject the utilities'
8 request for approval -- and this time I will get it
9 right -- of Riders CPP BGS, BGS-L, D and M, V.

10 And I would like to reserve the
11 remaining time for rebuttal.

12 CHAIRMAN HURLEY: I don't know that you really
13 have any, but I'll give you some.

14 MR. WEINBERG: Thank you very much.

15 Mr. Rippie, on behalf of Commonwealth
16 Edison.

17 MR. RIPPIE: Good afternoon, Mr. Chairman, and
18 Commissioners.

19 The petitioner's claim before you is
20 extraordinary. The petitioner's claim that ComEd's
21 proposal to charge customers only the actual cost
22 that it pays for buying the electricity that it is

1 required to purchase in order to serve its customers
2 is not a cost-based rate.

3 They claim that it is cost-based --
4 not cost-based despite the fact that Rider CPP has
5 not a penny of return, nor a penny of profit to
6 ComEd's costs. They claim it is not cost-based
7 despite the fact that its questions from the bench
8 elicited earlier, the wholesale market defines
9 exactly what it is that ComEd pays, and must define
10 what it is that ComEd pays since we have nowhere else
11 to purchase our power.

12 They say that it is not cost-based
13 despite the fact that the rider by its own terms is
14 specifically linked to exactly the monies that ComEd
15 pays to the suppliers of that power and has
16 mechanisms installed in it to ensure that that
17 pass-through is precisely accurate.

18 Now, your Honor asked whether these
19 issues had been discussed previously as part of the
20 post-2006 working group. And the answer is, you bet.
21 They were the center of the post-2006 working group
22 process.

1 The procurement working group spent
2 enhanced amounts of time determining and examining
3 what the best avenues were for this state as a whole
4 to proceed with utility procurement post-transition.
5 And procurement working group reached some directly
6 on point consensus conclusions.

7 It reached, and I'm not going to quote
8 the report because it is very lengthy. But it
9 reached amongst its 18 principles consensus
10 conclusions, the conclusion that a competitive
11 procurement approach was in the best interest of the
12 state; that the approach should focus on market-based
13 costs; that it should facilitate and encourage
14 supplier participation in the wholesale market; and
15 that it should minimize, as much as possible, the
16 need for after-the-fact prudence review.

17 The rates' working group, of which I
18 had the honor to chair, also discussed these issues.
19 The rates working group discussed at some detail how
20 the actual costs of those procurement processes
21 should be passed through to customers, and concluded
22 that in the event a competitive approach is used,

1 that a pass-through tariff on which ComEd has striven
2 to model its proposal is the best opportunity for the
3 state.

4 Now, it is true that there was a
5 dispute between BOMA and ComEd concerning whether or
6 not this proposal could be implemented absent some
7 legislative change; however, the comments of the
8 Attorney General ignore the fact that there was also
9 a complicated and detailed implementation working
10 group process that itself resulted in several reports
11 and commentary by the conveners of the various
12 parties and by the staff of the Commission.

13 And that throughout that process the
14 only party to expressly offer any objection, such as
15 that which you've seen now, was BOMA. And that
16 objection as is shown in the record was effectively
17 responded to by ComEd, and I believe other parties.

18 There is, in fact, no barrier to doing
19 precisely what ComEd offered.

20 The petitioners presented their
21 argument as a plea to follow the law and for prudence
22 and reasonability. Yet, what they argue is that you,

1 the Commission, have no authority to act to do what
2 is best for the state.

3 They argue that you are absolutely
4 without authority to approve a tariff that provides
5 for ComEd to acquire electricity for its customers
6 through an arm's lengths competitive bidding process
7 that gives no preference whatsoever to any supplier.

8 They argue that you without authority
9 to approve a tariff that is expressly designed to
10 drive that price down to the lowest possible level by
11 harnessing the power of the competition.

12 They argue that you are without
13 authority to approve a tariff that faithfully
14 implements the conclusions of the post-2006 process
15 that I just described.

16 And since it is a motion to dismiss,
17 they argue that you are without that authority under
18 any set of facts; that no matter what this hearing
19 might show regarding the benefits of ComEd's proposal
20 to consumers, as well as others, that you are without
21 authority to adopt it because the hearing will never
22 occur.

1 It is their position that the
2 proceeding gets terminated now before you have an
3 opportunity to hear the evidence, before you have an
4 opportunity to make actual factual judgments based on
5 the record about whether or not there is an efficient
6 wholesale market, about whether or not it does drive
7 prices to cost, about whether or not this proposal
8 is, in fact, in the best interest of consumers, as
9 well as, in the best interest of utilities, and
10 whether, in fact, it is the best option for the
11 state.

12 And that leads me, if I may, to one
13 brief purely legal point: This is a motion to
14 dismiss. It is an appeal for a motion to dismiss.

15 As a motion to dismiss, all facts pled
16 by Commonwealth Edison are established in its
17 testimony must be taken as true.

18 And the argument that there is
19 something inherently wrong with the competitive
20 market, that it did not work the way the General
21 Assembly intended, and that it cannot provide
22 necessary producing functions are all factual

1 assertions, and factual assertions that I might add
2 are strongly contradicted by the evidence that ComEd
3 has filed.

4 I suggest, and my client urges, that
5 the appropriate remedy is for the Commission to hear
6 that evidence and make determinations, not to stifle
7 this process at this early stage.

8 COMMISSIONER O'CONNELL-DIAZ: Mr. Rippie, are
9 you suggesting that the record that is being
10 developed in the dockets that are before us today, in
11 fact, are looking at the evidence from all parties
12 with regard to the very issue that the Attorney
13 General has put before us today with regard to
14 competitive marketplace, the auction process, all
15 varieties of questions regarding that?

16 MR. RIPPIE: Yes, with perhaps one exception,
17 your Honor.

18 The Attorney General portrays this
19 proposal as if it is an attempt to pass or propose
20 retail market-based rates, which it is not.

21 So I do not expect the evidence to
22 spend much time to talk about whether or not a

1 competitive declaration has occurred for residential
2 customers because, obviously, one hasn't.

3 What it will talk about is what is the
4 best way to determine ComEd's cost of serving all
5 those customers in the best interest of those
6 customers. And it will, in that context, discuss all
7 the things that your Honor outlined.

8 And that actually, in fact, is the
9 second point I would like to make; which is you've
10 got to be careful when you talk about cost-based and
11 market-based because, although, it sounds like
12 they're two different things, sometimes they're and
13 sometimes they're not.

14 In this case ComEd's costs are the
15 market. And that's nothing new. Throughout the
16 history of ComEd rate cases, the cost of its coal,
17 its oil, its uranium, its poles, its wires, its
18 labor, they have all been determined by the market.
19 And no one made any argument that those were
20 market-based rates.

21 What's new and novel here is because
22 of restructuring and because of divestiture, ComEd is

1 turning to the wholesale market for its electricity
2 and asks you to include those costs in its rates just
3 as it has asked for costs to be included in the past.
4 Certainly they are rates based on market prices and
5 market prices in the wholesale rates.

6 COMMISSIONER O'CONNELL-DIAZ: Mr. Rippie, let's
7 go back to a question that Chairman Hurley asked of
8 Mr. Weinberg --

9 MR. RIPPIE: Sure.

10 COMMISSIONER O'CONNELL-DIAZ: -- with regard to
11 where would ComEd go to procure that power, and what
12 price would that -- would that be a market price for
13 the power they would procure absent the approval of
14 the auction process that's at issue in this
15 proceeding?

16 MR. RIPPIE: Obviously, if the Commission
17 failed to approve the tariffs, my client would have
18 some serious consideration to do.

19 But it is certainly the case that
20 there is nowhere else for us to go to acquire that
21 power but for through a wholesale transaction; be it
22 with an affiliate, with a nonaffiliate, through an

1 RFP, through an auction or any other process.

2 We are faced with the prospect of
3 having to acquire the power that in the same way that
4 for years we have acquired the other resources that
5 we've used to provide services.

6 COMMISSIONER FORD: Mr. Rippie, if I'm hearing
7 you correct, the Commission will not be approving the
8 market-based, the retail rates under the auction
9 process?

10 MR. RIPPIE: That is correct.

11 COMMISSIONER FORD: But what we will be doing
12 is approving the bundle rate costs services which
13 this is just one component of that -- element that
14 will be derived from that market-based wholesale
15 transaction?

16 MR. RIPPIE: That's absolutely correct.

17 What we're asking you to do is to
18 approve a cost-based bundled rate. One element of
19 that is the cost of power, that's set by the power
20 market. One element of it is the cost of poles, I
21 suppose that's set by the pole market, if you will.

22 CHAIRMAN HURLEY: And these dockets that are

1 filed for Commonwealth Edison and Ameren are dockets
2 that were designed, basically, pursuant to the 2006
3 process. Is there anything to preclude a party
4 within the context of the dockets from advancing an
5 alternative to the new --

6 MR. RIPPIE: No. Your Honor, in fact --

7 CHAIRMAN HURLEY: I believe BOMA's testimony
8 made some suggestion of them?

9 MR. RIPPIE: That's correct.

10 And one of the other points is that,
11 of course, granting the motion to dismiss precludes
12 the opportunity of other parties being able to
13 present other alternatives in the context of this
14 docket to the Commission.

15 CHAIRMAN HURLEY: As you're winding up, I don't
16 want you to forget about my question.

17 MR. RIPPIE: That's just where I was going.

18 CHAIRMAN HURLEY: Do a little statutory
19 interpretation for us.

20 MR. RIPPIE: As I was going to wind up, I was
21 going to direct the Commission to a couple of key
22 steps of statements in the 1997 General Assembly Act.

1 The first is that I urge you to review
2 the statement of principles and purposes. And I also
3 urge you to look at the entire statute, as
4 Mr. Weinberg says is a whole.

5 In the statement of principles, the
6 General Assembly acknowledges that there is a
7 development going on in the industry, that that
8 development is national, and that development is
9 occasioned by the advent and further development of
10 markets.

11 It says the Commission should act to
12 make sure that customers benefit from those market
13 developments. That long-standing relationships among
14 parties are changing and must change. But that
15 nonetheless, utilities should recover their cost of
16 service.

17 And it indicates that despite the
18 restructuring that's going on, those principles, such
19 as recovery and cost of service should be respected.
20 It also in its text acknowledges that competition
21 will develop over a transition period, and that
22 competition will develop at different rates for

1 different customer classes, and that there are a
2 variety of protections built into the law for the
3 consumers.

4 And we suggest, as we outlined in our
5 briefs, that those consumer protections are present
6 in the proposal that we advanced as well.

7 We think this is entirely consistent
8 with the Act and the '06 process. And that the
9 Commission should deny the motion to dismiss.

10 Thank you very much.

11 CHAIRMAN HURLEY: Thanks.

12 COMMISSONER WRIGHT: Mr. Rippie, I've just got
13 one question, which is a little bit more global. But
14 if we were to adopt the Attorney General, People and
15 Consumers arguments that Section 16-103-C authorizes
16 market-based rates only for services that have been
17 declared competitive, and that forces you to go to
18 the wholesale market. My question is does that
19 potentially run ComEd afoul of the Edgar standard at
20 FERC at which it has declared that the procurement
21 must pass a just, reasonable and not unduly
22 discriminatory preferential test to guard against

1 affiliate transactions self-dealing in which the FERC
2 has determined is not -- is harmful to the retail
3 customer?

4 MR. RIPPIE: There are certainly a number of
5 alternatives. The short answer is, we hope not.

6 We would strive hard to avoid running
7 afoul of that. We believe that this proposal is
8 probably the best way of running afoul of that.

9 In the event that you granted the
10 motion, we would carefully analyze what types of
11 wholesale procurement we could do that would still
12 meet the Edgar standard.

13 But, of course, we would also have to
14 consider how potentially, frankly, seeking review of
15 a decision dismissing this because we believe so
16 strongly that this proposal is the best way to, as
17 your Honor says, ensure that our procurement costs,
18 which have to come from the wholesale market, meet
19 that standard that you just outlined.

20 I hope I answered your question.

21 Thank you.

22 CHAIRMAN HURLEY: Thank you, Mr. Rippie.

1 Next, Mr. Flynn, on behalf of the
2 Ameren companies.

3 How long have you been practicing at
4 this Commission?

5 MR. FLYNN: It's nearly a year.

6 Actually, that's just this afternoon.

7 Good afternoon, Mr. Chairman,
8 Commissioners. Thank you for the opportunity to
9 address you.

10 My name is Christopher Flynn. I'm
11 appearing on behalf of the Ameren facilities today,
12 which serve a combined peak load of about 75
13 megawatts who own virtually no generation. And
14 beginning January 1, 2007 must buy all the power the
15 customers use.

16 Mr. Weinberg presented the argument of
17 petitioners this afternoon in which he deftly avoided
18 the use of any of the Latin phrases which appear so
19 frequently in the pleadings.

20 And I had hoped that Mr. Rippie would
21 take on some of the nitty-gritty nuts and bolts of
22 statutory interpretation and leave the interesting

1 parts for me. But once again, he struck me down, so
2 I have to follow behind him and clean up his mess
3 once more.

4 (Laughter.)

5 The petitioners contend the Ameren
6 utilities seek to charge market prices to their
7 retail customers.

8 Secondly, that this is illegal under a
9 certain principle stated in Latin, that I'll spare
10 you for the moment. But Section 16-103 of the Public
11 Utilities Act is read the way the petitioners want it
12 read.

13 Neither contention is accurate. In
14 fact, the petitioner's own reading of the section is
15 inconsistent even for their own proposal for
16 procurement.

17 The Ameren companies propose, as ComEd
18 does, to recover their actual procurement costs from
19 their customers, not a penny more -- and I think this
20 is the part that bothers the petitioners -- not a
21 penny less. Just simply cost-based ratemaking. What
22 we pay in a competitive procurement process is what

1 we're trying to seek to recover from our customers.
2 We are not trying to earn any margin whatsoever on
3 generation.

4 The petitioners claim that what the
5 Ameren companies propose to do is abandon cost-based
6 ratemaking; that is, the process by which rates are
7 set to reflect a utilities' costs, and that we are
8 substituting market-based price.

9 To the contrary, again as Mr. Rippie
10 explained, as we explained ad nauseam in the
11 proceedings, we only seek to recover our costs.

12 The petitioner's theory is that
13 because we are buying at market prices, the rates
14 that reflect those prices are thereby converted into
15 market-based rates. This is nonsense.

16 Mr. Rippie offered a number of
17 examples, you know, there are all sorts of things
18 that we buy hopefully at market prices and not above.
19 We buy pencils. We buy paper. We buy wire. We buy
20 gasoline for our trucks. We hire employees. We're
21 buying all those in competitive markets. We are
22 paying those prices in competitive markets. We are

1 reflecting them in all rates. And this has never led
2 to a conclusion that our rates are market-based. To
3 the contrary, they're cost-based.

4 And the petitioners have it exactly
5 backward. They claim what we propose to do is charge
6 market-based rates for all generation services.

7 What we propose to do is charge
8 cost-based rates for all generation services
9 including services that today the power purchase
10 option, the PPO, that is set on a market basis; a
11 market value without respect to our costs.

12 In the future that will reflect our
13 actual cost of procuring generation in a competitive
14 market. Which brings us to Section 16-103, the heart
15 of the petitioner's claim and Latin terms.

16 That section -- and here,
17 unfortunately, I have, as Mr. Rippie has already
18 capably explained, addresses pricing for competitive
19 services.

20 Now, petitioners claim that under the
21 statutory construction principle of *expressio unius*
22 *est exclusio alteris*, the section bars market-based

1 pricing for noncompetitive services.

2 A couple points; one, as I explained,
3 we are not proposing market-based pricing, but
4 cost-based rights. And Latin phrase or not, the
5 section doesn't have anything to do with
6 noncompetitive services.

7 All that statutory construction
8 principle says is when the legislature spells out
9 certain specific things, it suggests that you can't
10 do other things.

11 Here in Section 16-103 all the
12 legislature is saying is: Look, if you have a
13 service that is declared competitive, here's how it's
14 going to be priced. You get a choice. You can
15 charge market value or you can charge your actual
16 cost determined in a real arm's length transaction.

17 So what it's excluding is some other
18 basis for pricing the competitive service. You can't
19 just price it at 20 cents a kilowatt hour or 50 cents
20 or \$10. You can only price it at market value under
21 another section of the Act or based on your actual
22 procurement cost in real arm's length transactions,

1 not the convenient ones that you arranged to
2 establish some value. That's it. Those are your two
3 choices. It doesn't say anything with those -- with
4 respect to those two cases about noncompetitive
5 rates.

6 There is no intent here to alter the
7 historical cost-based ratemaking that has been
8 applied to noncompetitive services, and we don't
9 propose to change that in any respect either.

10 We have shown up the way we have
11 always shown up saying, Here. This is how our costs
12 will be determined. And our rates will reflect our
13 costs. That's it.

14 So the Latin phrase or not, they can't
15 convert this into a statutory bar on cost-based
16 ratemaking.

17 Now, the petitioners complain that
18 what we're doing shifts the risk associated with the
19 market from the utilities to their customers. And
20 this is wrong on two counts.

21 First, rates are designed to recover
22 costs. If costs increase, it is expected that

1 customers will pay the increase in costs. There is
2 no guarantee, no provision in the Public Utilities
3 Act or anywhere else in Illinois law that allows
4 customers to lock in rates in perpetuity, not in
5 cost-based ratemaking.

6 Indeed, where certain costs have
7 proven to be particularly volatile; that is, they can
8 change suddenly and materially. The Commission has
9 allowed utilities to implement riders. And the
10 courts have approved. And that is exactly what the
11 Ameren utilities and ComEd are proposing here.

12 Second, as a policy matter, risk
13 should follow reward. That is customers will also
14 benefit from decreases in prices. As prices go up,
15 customers will pay them. As prices go down,
16 customers will pay the decrease prices.

17 What petitioners apparently want is a
18 heads, I win; tails, you lose scenario. Where if
19 prices go down, the customers get to pay those. But
20 if prices go up, utilities get to eat the difference.
21 That is not sound policy.

22 CHAIRMAN HURLEY: I guess it depends on who

1 you're talking to.

2 But you have to wind up. And don't
3 forget about my question of statutory interpretation
4 and what the legislature intended the Commission to
5 do in 2004 I note first, and now, of course, in 2007.

6 MR. FLYNN: I will right after this next point.

7 Petitioners state that in response to
8 a general question of Gee, what should we do if we
9 can't engage in this competitive auction process,
10 what alternatives do we have?

11 The petitioners offer that the most
12 obvious alternative is the purchase of electricity
13 through bilateral wholesale contracts with utilities'
14 low-cost generation affiliates. Really?

15 Even if we allowed ourselves what can
16 only can be described as a fantasy, that there is
17 some rationale market participant who would simply
18 willingly provide power at below-market prices, and
19 in the case of Ameren that magically they have twice
20 as much generation as the affiliate, and they do,
21 which is what would be required to serve the Ameren
22 load, petitioner's proposal is still illegal under

1 its own view in Section 16-103. In that section,
2 again, the General Assembly authorized pricing on two
3 bases for competitive services.

4 One of which was a competitive bidding
5 or another arm's length acquisition process, which
6 the petitioners now argue bars the use of that
7 process for noncompetitive services.

8 Well, bilateral wholesale contract is
9 another arm's length acquisition process. Unless, I
10 suppose, it's not arm's length, in which case, it
11 fails Edgar's standard, which is illegal for a
12 different reason.

13 So that leaves us -- Well, I don't
14 know where it leaves us. But it certainly doesn't
15 leave us with the petitioner's alternative.

16 I don't have anything to add to
17 Mr. Rippie's view on the discussion of the post-2006
18 process. I believe that where the legislature
19 intended you to be for rates beginning in 2007
20 continuing forward is that for noncompetitive
21 services those rates would be set on an actual cost
22 basis with one caveat. There is a cap on what we can

1 charge for generation set at market value, plus
2 10 percent.

3 And while there was a certain carrot
4 set out by the legislature to transfer generation out
5 of the utility, we will allow you to expedite the
6 process so you don't have to go through the same
7 torturous proceedings that you had to before. There
8 was a big stick too.

9 And the big stick was: Look. If you
10 hang on to your generation, if your actual costs of C
11 market value, plus 10 percent, you're going to eat
12 those. So we give you the next several years to
13 restructure. But take a look because that big stick
14 is out there and it can hurt.

15 So the utilities responded accordingly
16 and restructured and turned themselves into the
17 largest companies that I think in 1997 everybody
18 wanted them to be. And so here we are today.

19 Mr. Weinberg talked about the lack of
20 retail competition constraining the wholesale market.
21 I'm not really certain what that means. I'm not
22 aware of any commodities services or goods for which

1 competition between retailers and constrained
2 wholesale prices. Competition between wholesale
3 participants constrains wholesale prices irrespective
4 of the competition at the retail level.

5 But that's my response to your
6 question.

7 And I suppose to the extent that I
8 have any time left, I would reserve.

9 COMMISSONER WRIGHT: One question with your
10 reference to the FERC. And the question I posed to
11 Mr. Rippie, in order to not get a pass from the Edgar
12 Standard, but certainly it's clear that the FERC is
13 saying that if you procure power in an arm's length
14 transaction or in a competitive procurement auction
15 process like we're proposing or what is before this
16 Commission at this point and being argued here today,
17 that you're less likely to be called on the carpet
18 for having violated or falling short of meeting the
19 Edgar Standard? Is that your impression? It's kind
20 of a layman's interpretation.

21 MR. FLYNN: Yes.

22 The FERC is trying to protect, among

1 other things, the wholesale market. I think the
2 origins of the Edgar Doctrine were a protection of
3 captive customers of the utility. But I think FERC
4 has taken a more expansive view and now seeks to
5 protect, as well, the competitive process of the
6 whole thing.

7 And I think that some of the
8 participants that come behind me to argue to you, you
9 might ask some of the wholesale market participants
10 whether they would view a below-market bilaterals
11 contract between utilities and their affiliates as
12 satisfying the Edgar Standard or whether they would
13 to use a technical term, Scream bloody murder, when
14 they appear before the FERC.

15 CHAIRMAN HURLEY: I think the latter.

16 MR. FLYNN: It was leading, yes.

17 COMMISSIONER O'CONNELL-DIAZ: Mr. Chairman, if
18 I may?

19 CHAIRMAN HURLEY: Sure.

20 COMMISSIONER O'CONNELL-DIAZ: Mr. Flynn, you
21 touched on the, I'll call them deconditioning
22 dockets, those were fully litigated proceedings at

1 the Commission, weren't they, with regard to your
2 clients' companies as well as ComEd?

3 MR. FLYNN: Restructuring documents of which
4 the utilities either transferred or sold generation,
5 yes, those were docketed proceedings.

6 COMMISSIONER O'CONNELL-DIAZ: In which many
7 parties that are in this room today participated in
8 those?

9 MR. FLYNN: Some parties in this room chose to
10 participate in those dockets. Some did not.

11 COMMISSIONER O'CONNELL-DIAZ: And, in fact, in
12 those dockets that kind of set off the chain of
13 events that really moved the retail customer trace
14 along in its progression.

15 MR. FLYNN: I think it certainly did kick-start
16 it, yes.

17 COMMISSIONER O'CONNELL-DIAZ: Thank you.

18 CHAIRMAN HURLEY: Thank you, Mr. Flynn.

19 Our next presenter is Carmen Fosco
20 from the Staff of the Illinois Commerce Commission.

21 MR. FOSCO: Good afternoon, Mr. Chairman,
22 Commissioners. My name is Carmen Fosco. I am

1 representing Staff.

2 I would like to make clear first that
3 staff in responding to the motion to dismiss, oppose
4 them and fully supports the ALJ's rulings in denying
5 the motions to dismiss. We think the administrative
6 law judges got it right when they thought the factual
7 issues presented in this case should go forward and
8 should be considered by the Commission.

9 The -- there are really two key
10 components in Staff's view -- let me back up.

11 I would also like to make clear that
12 we -- while Staff did not file a response for the
13 petition of interlocutory review, our position on it
14 is the same as it was in response to the motion to
15 dismiss. The petition is -- a petition to review the
16 motion involves the same argument.

17 CHAIRMAN HURLEY: You filed a motion to dismiss
18 not a petition for interlocutory review?

19 MR. FOSCO: Correct, Mr. Chairman.

20 And actually before I get into the
21 substance, let me address your question as best I
22 can.

1 I was not, myself, a participant in
2 the post-2006 process except for one meeting. Having
3 said that, though, my understanding from the review
4 of the reports is that while the specific arguments
5 raised in this motion were not apparently raised
6 within that process, certainly the concept as to the
7 legality of the method for procuring power was, in
8 fact, the focus of that process.

9 So it seems that what everyone was
10 there for was to develop a workable, legal,
11 sustainable method that would be beneficial to all
12 parties to procure power post-2006 under the '97 Act.

13 As to the '97 Act --

14 CHAIRMAN HURLEY: And you believe it was always
15 contemplated that the Commission would have that
16 process? Entertain that process?

17 MR. FOSCO: I think it was wise and allowable.
18 And I think it was contemplated by what the
19 legislature had done. It was not directed, but I
20 certainly think it was within the scope.

21 As to the statutory construction, the
22 1997 amendments contemplated several important

1 developments.

2 One, was to incorporate competitive --
3 the benefits of competition were for all parties and
4 to incorporate into the process that it used to set
5 rates.

6 Clearly, that specific process is set
7 forth for declaring certain services as competitive,
8 and the legislature gave a specific direction as to
9 what happens when that declaration is made.

10 It's also important to note that the
11 legislation specifically contemplated that the
12 utilities would potentially divest themselves with
13 generation, which has, in fact, happened for
14 utilities that are here.

15 And in doing that, we have to read the
16 statute as a whole. And I think it's clear that the
17 legislature had contemplated that the Commission
18 would be setting rates possibly in a context where
19 utilities own no generation and must purchase their
20 power. And that's exactly the issue we're faced with
21 here.

22 And I think that key in looking at

1 this is that in 16-103, lower case, (a) which
2 specifies that nothing in the subsection shall be
3 construed as limiting the electric utilities' right
4 to propose or the Commission's power to improve,
5 allow or modifications in the rates, terms and
6 conditions for such services pursuant to Article 9 or
7 Section 16-111 of this Act.

8 So I think there's two key components
9 of what the legislature contemplated.

10 One, your powers are exactly as they
11 were before the Act for services that have now been
12 declared competitive. There is no limitations by
13 virtue of what we've done here, which I think is key
14 when you consider this motion, to how you set rates.

15 Secondly, they did provide you with
16 some guidance. You must consider 16-111.

17 And 16-111 puts a soft cap, if you
18 will, on the rates; cost-based rates. This is one of
19 the ways in which the legislature insured that
20 ratepayers would not pay anymore than what the
21 market-based rates are. They could potentially pay
22 less if there was a utility that had, for instance,

1 generation that was below the market rate. But there
2 was definitely going to be a benefit to -- that would
3 be mandated if the situation arose. And as part of
4 this docket, that is the issue that is being looked
5 at.

6 In terms of the motion to dismiss, I
7 think as I said -- I started to say earlier, there is
8 two key components. I think one, and I don't want to
9 repeat, but it's the interpretation of 16-103(c).

10 What I would like to add to what has
11 already been said, which I think Staff is generally
12 in agreement with is there is no specific
13 prohibition. The move that the petitioners have read
14 into 16-103 limitations, it's not there on its face.
15 We think they have got it wrong on how they interpret
16 16-103(c).

17 Their argument based on the Latin
18 principle, which I won't try to pronounce, is that
19 the legislature authorized this, so everything else
20 must be prohibited.

21 I think it's set forth in our response
22 to the motion. We believe that's an incorrect

1 characterization of what 16-103 is.

2 16-103 is actually the limitation on
3 what the Commission can do if rates are declared
4 competitive.

5 In other words 16-103(a) says if
6 services are declared competitive, basically, the
7 utilities are free from the obligation to provide
8 those services.

9 16-103(c) and other sections provide
10 limitations on when a service is declared
11 competitive.

12 So I think their argument is premised
13 on this is a specific authorization. The
14 authorization really happens in 16-103(a) not (c).

15 And 16-103(c) is really a limitation
16 saying, When you declare services competitive for
17 residential and small business consumers, we, the
18 legislature, have decided to impose a limitation. It
19 must be cost-based -- or it must be market-based,
20 which they define cost as market, which is, A, either
21 market rates has defined in another provision of the
22 Act. Or, B, costs pursuant in an arm's length

1 transaction.

2 And, we, the Staff believes that the
3 process, as a matter of law, cannot be -- that's been
4 proposed here, cannot be said to be outside of the
5 Commission's jurisdiction when you view 16-103 in
6 that light.

7 And I think that's the point the ALJs
8 were making when they said that just because the
9 16-103(c) defines cost in one instance as
10 market-based doesn't mean that we are now prohibited
11 from using that cost basis under our traditional
12 power. And we think they got that right.

13 COMMISSONER WRIGHT: Excuse me.

14 So what you're saying is
15 Section 16-103(c) that you don't find anything that
16 prohibits the use of market-based rates to establish
17 a fixed price for bundled service?

18 MR. FOSCO: If you take the earlier discussion
19 that we think the whole concept -- we don't think
20 that the term, "market-based rates" is really the
21 best term to apply here.

22 It's really cost-based rates that have

1 to be established through a process that incorporates
2 prices. So with that clarification, that is correct.
3 I agree with that.

4 Second, the other big component of the
5 argument is that petitioners argue that consumers
6 will be deprived of protections in the PUA. We
7 disagree. We think that ignores what this proceeding
8 -- that is, we hope going forward is here to
9 decide (sic). This is the proceeding where the
10 Commission is going to decide if this process is
11 proper. It will develop just and reasonable rates.

12 The way I like to think of it is it's
13 kind of like the competitive procurement process sets
14 forth a flow-chart or a decision tree saying, Here's
15 how we intend to procure power through this auction
16 process. Everyone has a chance to complain about it.
17 Say it needs additional protections, whatever, and
18 even make arguments about the market that it can't
19 work.

20 But as a legal matter, we don't think
21 it can be said that there is no set of rules or
22 guidelines that can be established by which this

1 Commission can conclude that the rates that would
2 result would be just, reasonable and prudent.

3 I guess that's really all I have to
4 say.

5 If you have any questions.

6 Thank you very much.

7 CHAIRMAN HURLEY: Thank you. Thank you very
8 much. You make a very good point with your argument.
9 One that's been kind of on my mind.

10 Next we are going to hear from Chris
11 Townsend on behalf of Constellation Energy,
12 MidAmerican Energy Company, Peoples Energy Services
13 Corporation, U.S. Energy Savings Corporation.

14 Mr. Townsend.

15 MR. TOWNSEND: If I may approach?

16 CHAIRMAN HURLEY: Sure.

17 COMMISSIONER O'CONNELL-DIAZ: Mr. Townsend,
18 have all counsels had the opportunity to see this?

19 MR. TOWNSEND: It was served on all parties.

20 MR. WEINBERG: I'll note for the record it was
21 not served 48 hours before the hearing, the 48 hours.
22 It was not possible.

1 COMMISSIONER O'CONNELL-DIAZ: We figured you
2 would have this memorized already.

3 MR. WEINBERG: I do.

4 MR. TOWNSEND: Chairman Hurley, Commissioners,
5 Colleagues. Good afternoon.

6 I'm Christopher J. Townsend, appearing
7 as you noted on behalf of Constellation New Energy,
8 Inc., MidAmerican Energy Company, Peoples Energy
9 Services Corporation, and U.S. Energy Savings Corp --
10 companies that's are active suppliers in the retail
11 energy markets and that have intervened in both the
12 ComEd and the Ameren proceedings.

13 The retail suppliers responded to the
14 motion to dismiss and opposed the motion to dismiss
15 and saw no reason to rehash the arguments in response
16 to the petition for interlocutory review.

17 The ALJ got it right. The motion to
18 dismiss should be denied.

19 The retail suppliers have requested
20 that I accomplish two goals this afternoon.

21 First, they requested that I convey to
22 you that the law is clear. The auction process is

1 consistent with the Illinois Public Utilities Act;
2 that is, the Illinois Commerce Commission has the
3 statutory authority to approve a procurement process
4 for post-transition, noncompetitive rates where
5 generation component of those rates is a function of
6 the market value.

7 Second, the retail suppliers requested
8 that I convey to you that the policy justification
9 for the motion to dismiss is unclear.

10 No policy has been presented that
11 would justify the Illinois Commerce Commission
12 rejecting outright the utilities' procurement
13 proposals.

14 To assist with each of these points, I
15 brought along a magnifying glass.

16 To make the first point, I will use
17 the magnifying glass as a highlighter to show that
18 the law is clear. The Commission may approve an
19 auction process to set generation rates for customers
20 even before those rates are declared competitive.

21 The movant suggests that the Illinois
22 General Assembly didn't provide any explicit guidance

1 regarding the way in which these rates should be set
2 following the mandatory transition period for
3 customers whose rates have not yet been declared
4 competitive.

5 As a result, they suggest that you
6 should imply that you do not have the authority to
7 approve market-based rates for such customers.

8 According to the movant, the General
9 Assembly only has provided guidance regarding
10 customers classes that have been declared
11 competitive. They point to the section of
12 Section 16-103(c) which addresses the way in which
13 rates should be set for customers in classes that
14 have been declared competitive.

15 Not surprisingly, the Act says that
16 for those customers, the rates should be set at the
17 market. That they should receive market-based
18 prices.

19 The movants then recite the
20 incantation that Mr. Flynn has so rightly reflected
21 for you: *Expressio unis est exclusio alterius*; that
22 is to express one thing, implies the exclusion of the

1 others.

2 And with that incantation, they assert
3 that the Commission should imply that it does not
4 have authority to approve market-based prices, to set
5 market-based prices for customers in classes that
6 have not been declared competitive.

7 But the Commission doesn't need to
8 rely on implication or incantations. The General
9 Assembly thought about this. Their intention is in
10 the Act itself. They provided explicit guidance with
11 regards to this situation.

12 Section 16-111(i) provides that in
13 determining the justness and reasonableness of the
14 electric power and energy component of an electric
15 utility's rates; that is the generation component of
16 electric utility's rates. Subsequent to the
17 mandatory transition period and prior to the time
18 that the provision of such electric power and energy
19 is declared competitive.

20 That's exactly the time we're talking
21 about here. We're beyond the transition period.
22 We're in the post-2006. And the rate hasn't been

1 declared competitive.

2 The Act says that the Commission shall
3 consider the extent to which the electric utilities
4 tariffed rates for such component for each customer
5 class exceed the market value determined pursuant to
6 Section 16-112. That is, the Commission is required.
7 The Commission shall consider. The Commission is
8 required to consider the market price of generation.

9 The remainder of Section 16-111(i)
10 provides that following the rate freeze, after the
11 mandatory transition period and prior to a
12 competitive declaration that the Commission may set
13 the rates for generation at 10 percent above market
14 prices. That it would be just and reasonable for the
15 Commission to make such a conclusion.

16 Thus, the Commission has been mandated
17 by the General Assembly that following the mandatory
18 transition period for customers whose rates have not
19 yet been declared competitive, the Commission is
20 required to consider the market price for generation.

21 The General Assembly also concluded
22 that rates as high as 10 percent above that market

1 price generation could be just and reasonable.

2 The harmonious interpretation of
3 Section 16-103(c) and Section 16-111(i) has been
4 offered by Mr. Fosco.

5 Section 16-103(c) requires, it
6 requires, that all competitive rates be set at market
7 prices. Section 16-111(i) authorizes the Commission
8 to tie generation component of noncompetitive bundled
9 rates to the market price for generation.

10 It's provided for in
11 Section 16-103(a). It says that you can do this.
12 The General Assembly guided you to look to
13 Section 16-111 which gives you the exact steps that
14 you should take.

15 Chairman Hurley, responding to your
16 question at the opening of oral arguments.

17 CHAIRMAN HURLEY: I think you did.

18 MR. TOWNSEND: The law is clear. The first
19 point has been made.

20 The second point is that the policy
21 justification for the motion to dismiss is not clear.
22 It is not clear why the Illinois Commerce Commission

1 would adopt a position that almost inevitably would
2 result in oversight of the post-transition
3 procurement process shifting from the Illinois
4 Commerce Commission to the Federal Energy Regulatory
5 Commission.

6 For this point, I use the magnifying
7 glass as a symbol, a symbol for investigation. You
8 can search throughout the movant's briefs, throughout
9 their petition for interlocutory review, and try to
10 find a justification. That search will turn up
11 empty.

12 The procurement process that has been
13 proposed by the utilities requires approval by the
14 Illinois Commerce Commission. Their proposal
15 requires that the Illinois Commerce Commission select
16 an independent auction advisor. It includes an
17 auction that would be monitored by the Illinois
18 Commerce Commission and implemented by an independent
19 auction manager.

20 The utilities' proposals require that
21 the auction advisor and the auction manager each
22 submit a report to the Illinois Commerce Commission

1 following each auction. And their proposals allow
2 the Illinois Commerce Commission to reject the
3 auction results by initiating a formal proceeding.

4 By contrast the way in which utilities
5 otherwise would procure power in the wholesale market
6 would not be reviewed by the Illinois Commerce
7 Commission.

8 Significantly, the movants don't offer
9 an alternative way in which the utilities should
10 procure their power.

11 Chairman Hurley, your second question
12 with regards to was this considered within the
13 post-2006 process, it certainly was.

14 There was a specific workshop that was
15 dedicated to answering this question: What should
16 that procurement process be? The procurement working
17 group came up with a lengthy list of criteria.

18 And as Mr. Rippie has pointed out, the
19 criteria are consistent with the proposal that's
20 offered here.

21 And the movants have the opportunity
22 to suggest otherwise within the context of this

1 proceeding.

2 This process would result in
3 market-based rates for consumers and that was one of
4 the recommendations of the procurement working group.

5 In their petition for interlocutory
6 review, the movants suggest, but don't advocate, that
7 it might be better for FERC to review bilateral
8 contracts between the utilities and their affiliates.

9 They suggest this rather than having
10 the Illinois Commerce Commission approve the design,
11 the implementation and the results of the auction.

12 The movants admit in their reply in
13 support of their motion to dismiss that what
14 wholesale sellers charge the utilities is the Federal
15 Energy Regulatory Commission's exclusive domain.

16 Thus, it appears that if the Illinois
17 Commerce Commission, if you decide to rule in favor
18 of the movants and dismiss the utilities' procurement
19 proposals, you will be opting for a process over
20 which you will have no prior input, which you will
21 not oversee, and which you will only be able to
22 conduct an after-the-fact review regarding, after you

1 will have already ruled that you don't want to be
2 involved in the process by granting the motion to
3 dismiss.

4 CHAIRMAN HURLEY: I suppose that's one way out.

5 (Laughter.)

6 MR. TOWNSEND: It is one way out, perhaps not
7 the best way out for participants in the Illinois
8 market.

9 And it's surprising because there is
10 no policy justification. Search. Look for it. Try
11 to find it. We did. We didn't see it. There is no
12 justification for the Illinois Commerce Commission
13 relinquishing its authority to the Federal Energy
14 Regulatory Commission to oversee the competitive
15 procurement of the electricity for Illinois
16 consumers.

17 As you can see, the law is clear, and
18 the policy justification for the motion to dismiss is
19 nowhere to be found. The motion to dismiss should be
20 denied.

21 Thank you.

22 CHAIRMAN HURLEY: Thank you, Mr. Townsend.

1 Any questions for Mr. Townsend?

2 We like visual aids here. We don't
3 get entertained much at the Illinois Commerce
4 Commission.

5 We have from Local 15, 01, 702 The
6 International Brotherhood of Electrical Workers, Mr.
7 Christopher Hexter.

8 MR. HEXTER: Commissioners, as I said, my name
9 is Christopher Hexter. I'm here on behalf of
10 Local 15, 01, 702, I.B.E.W. that represent all of the
11 bargaining union hourly paid employees at ComEd,
12 Ameren CILCO, Ameren CIPs and Ameren IP, as well as,
13 virtually all the hourly-paid employees at the
14 affiliated generating companies of these utilities.
15 These numbers are in the thousands. These employees
16 are also customers of the services provided by
17 utilities, and they fall within as customers within
18 the group of -- cap of customers as characterized by
19 the Attorney General.

20 As has already been said by others,
21 the issue before the Commission today at this stage
22 of the process is whether -- is a purely legal one

1 which is whether on the pleadings submitted by ComEd
2 and Ameren in these four cases.

3 Accepting their facts as true, the
4 Commission should dismiss the proposed auction
5 process to the extent that the utilities seek to have
6 applied to the rates to be charged to customers whose
7 service has not yet been declared competitive.

8 I am not here to speak on the
9 intricacies or the merits of the different aspects of
10 the auction process or to some of the practical
11 difficulties that have arisen because of the utility,
12 the holding Company's decisions to unbundle or
13 disengage their generation operations from their
14 transmission and distribution operations or to assert
15 that the Company purchased stands-alone apart from
16 its significant generating capacity in Illinois.

17 It seems to me that-- what I'm going
18 to focus on now is the statute and on what I believe
19 the statute requires in Illinois law.

20 One, you have to use the tools of
21 statutory analysis. The Commission is a creature of
22 laws passed by the legislature and must live within

1 those laws properly interpreted.

2 The Commission must try to interpret
3 the law to give meaning to the legislatures'
4 intentions.

5 And in this law its often opaque,
6 somewhat -- there is sentences that seem to go on for
7 it seems like pages of the statute books, so it's not
8 an easy task.

9 The Commission, when interpreting
10 those laws that govern the sanctions, must read the
11 whole law, and not just parts which favor a
12 particular outcome.

13 The Commission must apply the plain
14 meaning of the words of the statutes that govern its
15 actions. And where there are seeming conflicts
16 between various sections of the statutes, in part
17 engendered by the complex issues that the statute was
18 dealing with, the Commission must solve those
19 conflicts consistent with the overall intent of the
20 legislature.

21 And to deal with what's been dealt
22 with already by Mr. Foley and by some of the other

1 advocates here, when interpreting the statute that in
2 numerous places draws a distinction between customers
3 whose services has been declared competitive from
4 those whose service has not been declared
5 competitive, the legislature should apply a
6 well-accepted tool of legislative analysis.

7 That the inclusion of one class of
8 customers in a particular group with consequences
9 means that the exclusion of the other group from
10 those consequences; that is, the expression of the
11 one thing means the exclusion of the other or the
12 alternative. I'll forget the Latin.

13 In the present case, it means that
14 certain things come for customers whose service has
15 been declared competitive, as well as, certain things
16 no longer apply for them.

17 And just as clearly, certain
18 protections exist for customers whose service has not
19 been declared competitive because of the different
20 status relative to the energy supply market in
21 Illinois.

22 So looking at the actual, the statute,

1 first you begin with the legislative findings because
2 that's where you try to discern the legislature's
3 intent. And you begin with Section 16-101(a) in
4 which the legislature first paid its respects to, and
5 I quote, "The comprehensive electrical utility system
6 historical subject to state and federal regulation
7 aimed at providing all Illinois customers with safe,
8 reliable, affordable service while providing
9 utilities with the safe return under this
10 investment." That's the system that the state has
11 operated on for 100 years.

12 Then look at Section 16-101(b) and (c)
13 and there in those sections the legislature
14 recognizes there were competitive forces affecting
15 electrical markets, and that competition may create,
16 and the word is "may," create opportunities for lower
17 cost for users of electricity. And then stated that
18 regulatory relationships had to be altered to
19 accommodate competition.

20 But at the same time, it insisted that
21 the safety, reliability, and affordability of
22 electrical power would not be sacrificed to

1 competitive pressures.

2 Going on again, Section 16-101(d):

3 The legislature insisted that while developing an
4 effective competitive market, it was necessary to put
5 these protections in place and to ensure safe,
6 reliable and affordable electricity for all
7 customers.

8 If you go on, -- it seems to me that
9 that --

10 CHAIRMAN HURLEY: Is that the rate freeze that
11 you refer to?

12 MR. HEXTER: Excuse me?

13 CHAIRMAN HURLEY: Are you referring to the rate
14 freeze?

15 MR. HEXTER: I'm referring, I think that is the
16 rate freeze. I don't have the right section, but it
17 is what it is. It's Section 16-101(d).

18 It seems to me that right at the start
19 of the process, the legislature recognized that there
20 were different classes of customers out there in the
21 market and that the Commission had to be concerned
22 about those customers in the process who could not

1 have -- who would not have choices due to the fact
2 that various entrants in the market may not choose to
3 service them; therefore, those customers would not
4 have alternatives.

5 That's reflected in the definition
6 section where the legislature refers to the entrants
7 of possible alternative retail electrical suppliers
8 in the market, and then provides a section on
9 competitive service, provides a section on delivery
10 services that utilities are supposed to provide.

11 And, in fact, it showed that those
12 delivery services have, although provided, have not
13 been accessed near to the extent that may have been
14 anticipated by the legislature by ARES or other
15 utilities.

16 Then the legislature went on to the
17 service obligation of the utility, Section 16-103.
18 This section of the 1997 amendments made clear the
19 distinction that the legislation drew between
20 customers who would likely have choices under the due
21 law and those whose choices after the fact would
22 still be nonexistent or negligible.

1 16-103(a) provided that the utilities
2 shall, the word is not may. The word is shall.
3 Shall provide traditional tariff service to the
4 retail customers as they were on the effective date
5 of the 1997 amendments till their service is declared
6 competitive.

7 Section 16-103(c) specifically
8 provided for residential customers and small
9 commercial retail customers that utilities have a
10 continuing obligation to provide, again the operative
11 word was shall, not may, provide them tariff service
12 with the same bundled utility services they were
13 doing in 1997.

14 It then went on: For customers whose
15 components of service were declared competitive, the
16 legislature stated that the cost of providing that
17 service would be unlike those which is provided to
18 the tariff bundled service users.

19 This area that the legislature
20 provided market-based prices defined by Section 16-12
21 of the Act or by the electric utilities cost of
22 obtaining electric power and energy at wholesale

1 through a competitive bidding or other arm's length
2 acquisition process.

3 It seems to me that in the Section,
4 the legislature in effect divided out two sets of
5 customers; those that have been declared competitive
6 and those that had not been declared competitive.
7 And for those that were still not declared
8 competitive, there had to be the continuing force of
9 traditional rate regulation; whereas, it was not --
10 that process would not be available or provided for
11 those customers who chose to go into the market
12 basis.

13 My time is up? Thank you.

14 I would just say -- I'll just say --
15 one more thing. If you tie Section 16-103(a) and (c)
16 to Section 16-113 which provides for specific
17 declarations of competitive service, it seems to me
18 when you read the sections of the statute as a whole,
19 you cannot say that the auction process, which is a
20 market-based process is a process that is applicable
21 to customers who lack choice in the Illinois
22 marketplace.

1 Thank you.

2 CHAIRMAN HURLEY: Thank you, Mr. Hexter.

3 We're going to do something unusual
4 and take about a 15-minute break.

5 (Whereupon, a recess was taken.)

6 CHAIRMAN HURLEY: Next we're going to hear from
7 Mr. Giordano.

8 Where is Mr. Giordano?

9 Freddie Greenberg on behalf of Midwest
10 Independent Power Suppliers and the Electric Power
11 Supply Association.

12 Good afternoon, Mrs. Greenberg.

13 That's apparently left over from
14 Mr. Townsend.

15 (Laughter.)

16 MS. GREENBERG: It's unreachable for me.

17 Good afternoon. I'm appearing today
18 on behalf of two groups, the Midwest Independent
19 Power Suppliers and the Electric Power Supplier
20 Association or MIPS, EPSA.

21 EPSA is the national trade association
22 representing competitive power suppliers, which

1 include generators and marketeers and MIPS is the
2 trade association comprised of competitive power
3 suppliers with a particular focus on Illinois, and
4 the rest of the Midwest. Members of both groups
5 participate in the wholesale power markets in the
6 Midwest.

7 Today competitive suppliers account
8 for 40 percent of the installed generating capacity
9 in the United States, and provide reliable
10 competitively-priced electricity from environmentally
11 responsible facilities.

12 MIPS and EPSA both seek to bring the
13 benefits of competition to all consumers of
14 electricity.

15 I want to note before I go on that
16 this statement while representing the position of
17 MIPS and of EPSA each as an organization, does not
18 necessarily represent the view of each member of each
19 group on each point.

20 You've heard from several people today
21 who, basically, take the same position that we do and
22 that is in support of the ALJ's orders in response to

1 the motions to dismiss. And we would urge the
2 Commission not to dismiss this case.

3 I would like to emphasize two points
4 that were made already, and then just make a couple
5 of other points.

6 First of all, we believe that the ALJ
7 rulings correctly interpreted Section 16-103(c), and
8 that the discussion there and the requirement of
9 market-based rates as the cost for service that has
10 been declared competitive in no way addresses the
11 ability of the Commission to approve or of utilities
12 to use a market-based approach for rates as a cost --
13 as a component of the cost for rates that have not
14 yet been declared competitive.

15 And, secondly, the rulings of the ALJs
16 correctly find that the rates that would be paid
17 under the proposed riders would, in fact, be
18 cost-based if based on the proposed procurement
19 process.

20 We have a situation here where the
21 utilities no longer own generation. They have to buy
22 electricity from third-parties, and the cost of that

1 electricity is their cost, which is only one
2 component of the rates that their retail customers
3 would pay.

4 I would like to just mention, however,
5 what I think the result would be if the Commission
6 chose to grant the motions to dismiss. By doing so,
7 the Commission would be essentially eliminating
8 competitive procurement as one alternative by which
9 the utilities in question could obtain their needed
10 power supply.

11 In a situation where you're dealing
12 with customers whose service has not yet been
13 declared competitive, those customers do not have the
14 opportunity to shop on their own for power supply.
15 They have but one source.

16 The utility, however, has the
17 opportunity to shop on their behalf. And that is one
18 of the benefits of considering a competitive
19 procurement process.

20 On behalf of the two organizations,
21 EPSA and MIPS, I can tell you when there is a
22 competitive process, our members will sharpen their

1 pencils because they want to sell their generation
2 output. And from their standpoint, it doesn't matter
3 whether the ultimate retail consumer is served by
4 competitive service or by bundled service. The
5 wholesale competitors will compete just as hard and
6 really enable the utilities to shop on behalf of
7 those customers whose service has not yet been
8 declared competitive.

9 So from our standpoint, we certainly
10 hope you will agree that it would really be
11 counter-productive insofar as the best deal for the
12 consumer if you were to grant the motion to dismiss
13 rather than fully considering the issues in this
14 proceeding. And, of course, those issues could
15 include consideration of other alternative approaches
16 if those are presented.

17 COMMISSIONER O'CONNELL-DIAZ: So,
18 Mrs. Greenberg, what you're suggesting is that a
19 competitive procurement methodology, you believe
20 offers, has a potential to offer consumers the lowest
21 prices for that electric, that part of the overall
22 rate that they will be charged by the utility?

1 MRS. GREENBERG: It has that potential because
2 of the fact that the participants in the wholesale
3 market will complete in order to be able to be the
4 suppliers, the suppliers who are chosen. And I think
5 it would be unfortunate if consideration of that were
6 cut off by virtue of granting this motion.

7 Thank you very much.

8 CHAIRMAN HURLEY: Thank you, Mrs. Greenberg.

9 Mr. Giordano, are you ready for us
10 now?

11 MR. GIORDANO: I was informed that you were so
12 anxious to hear my argument that you wanted me to go
13 out of order. I appreciate that.

14 CHAIRMAN HURLEY: For 20 years I've been --

15 MR. GIORDANO: Can I approach, your Honor. I
16 think I was No. 8 on this list after Freddie.

17 But you know --

18 COMMISSONER WRIGHT: Mr. Giordano, I learned
19 that you never call that kind of stuff to the
20 Chairman's attention. The Chairman is almost
21 inherently right all of the time.

22 CHAIRMAN HURLEY: In the words of a former

1 chairman, thanks.

2 MR. GIORDANO: You know, I must really count
3 Chairman Hurley as one of my friends because he so
4 enjoys giving me a hard time. Only my closest
5 friends enjoys it as much as Chairman Hurley does.

6 And I have learned one thing Chairman
7 Hurley being around so long, and that is to answer
8 your questions first. So that's what I'm going to
9 try to do today.

10 On your first question of --

11 CHAIRMAN HURLEY: By the way, in case you don't
12 know it Mr. Giordano is here on behalf of the
13 Building Owners and Managers Association of Chicago
14 Developers Fund.

15 MR. GIORDANO: Thank you. I appreciate that.

16 On your question of whether the
17 working groups dealt with the issue of the
18 Commission's authority to approve the post-2006
19 procurement process, the answer is: As you know,
20 there was no consensus agreed on the procurement
21 approach to be used. And the legal issues were
22 simply not considered in the working group meetings

1 whatsoever.

2 After the meetings, the groups did
3 issue reports, but no consensus was reached on the
4 legal issues. As the Attorney General pointed out,
5 there was actually a dispute between ComEd and BOMA
6 and Trizec Insurance Team (phonetic) on the legal
7 issue.

8 And as a result of this, and on their
9 own initiative the Commission staff stated on Page 18
10 of the post-2000 Staff report that Mr. Clark attached
11 to his testimony as Exhibit 1.2 "That the Commerce
12 Commission should clarify its authority to implement
13 the use of any given procurement methodology in
14 general and a vertical tronch (phonetic) auction as
15 proposed by ComEd here in particular.

16 So I really think the Attorney General
17 and the other parties have given the Commission an
18 opportunity that you should be thankful for to
19 clarify your authority.

20 Now, we disagree with Commonwealth
21 Edison and some of the other parties on what your
22 authority is. We believe that you can't approve

1 Rider CPP the way it was proposed by ComEd, that you
2 don't have the authority to do that. And as a result
3 of that --

4 CHAIRMAN HURLEY: You argue that the Commission
5 has no authority to pre-approve rates?

6 MR. GIORDANO: That's correct.

7 CHAIRMAN HURLEY: What does that mean?

8 MR. GIORDANO: Should I answer your second
9 question first or do you want me to get into that
10 question?

11 CHAIRMAN HURLEY: I don't care.

12 MR. GIORDANO: All right.

13 CHAIRMAN HURLEY: I can only deal with one
14 thing at a time. Go ahead and answer that question.

15 MR. GIORDANO: Okay. What we mean is that if
16 the Commission -- what ComEd is proposing is that the
17 auction be, essentially, preapproved by the
18 Commission in this proceeding. So that as long as
19 the rules of the auction are followed, then the
20 Commission would, essentially, be obligated to
21 approve the auction. Okay. That's a preapproval as
22 opposed to a post-prudent review by the Commission

1 after the auction of what the charges are. Okay?

2 The problem with ComEd's contention is
3 it relies on a leap of faith which BOMA does not
4 believe the Commission has the legal authority to
5 make under the current Public Utilities Act and
6 existing case law.

7 Specifically, ComEd is asking the
8 Commission to approve tariffs which involve the
9 Commission pre-determining that whatever charges that
10 result from the auction will be prudent and
11 reasonable as predetermined in this case as long as
12 the rules of the auction are followed.

13 As ComEd Witness Betty Moller stated
14 in her direct testimony on Lines 148 to 150, "The
15 best way to ensure reasonable energy prices is not by
16 an after-the-fact review, but by approving in advance
17 a competitive procurement process that guarantees
18 procurement at efficient wholesale rates."

19 I'm sure -- this is ComEd's own
20 testimony. They agreed on this point, that they want
21 a preapproval. The question is whether the
22 Commission has authority to do that.

1 In other words, if the Commission
2 approves ComEd's tariffs, the Commission would give
3 up its authority to review the charges determined by
4 the auction if the auction rules are followed. This
5 is a leap of faith which BOMA does not believe the
6 Commission has authority to make under existing law.

7 Now ComEd makes much of the Illinois
8 Supreme Court's 1958 decision in City of Chicago
9 versus the ICC, which upheld the Commission's
10 authority to permit a utility to automatically
11 increase its rates, to recover the cost of wholesale
12 power purchases pursuant to an approved mathematical
13 formula.

14 ComEd states in its response that the
15 Supreme Court found that the Commission statutory
16 authority to approve rate schedules embraces more
17 than the authority to approve rates fixed in terms of
18 dollars and cents. And that the Court in City of
19 Chicago found it sufficient that the Commission
20 retained its power to initiate a proceeding
21 investigating the utility's rates.

22 A statutory power, which ComEd claims

1 in its reply, remains intact in its proposed tariff
2 here. We disagree. We don't believe that your full
3 power remains intact under this tariff because the
4 Commission would not be able to investigate the
5 reasonableness of ComEd's charges for electricity
6 supply post-auction if it approves Rider CPC.

7 The fact is under ComEd's proposed
8 tariffs, the auction manager who is to be hired by
9 ComEd, and the auction monitor will report to the
10 Commission on whether the auction's rules and
11 procedures were followed. That's right in the
12 tariff, these reports, and not a discussion of
13 whether the auction results are reasonable based on
14 wholesale market conditions at the time will be the
15 only information the Commission will have in making
16 its determination. Within two days of the completion
17 of the auction of whether to certify the auction.

18 Furthermore, if the Commission goes
19 ahead and certifies the auction, the Commission would
20 no longer have authority to investigate the
21 reasonableness of ComEd's charges for electricity
22 supply.

1 COMMISSIONER O'CONNELL-DIAZ: Mr. Giordano,
2 this is a motion to dismiss.

3 MR. GIORDANO: Yes.

4 COMMISSIONER O'CONNELL-DIAZ: Help me out in
5 understanding the appropriateness of the motion to
6 dismiss --

7 MR. GIORDANO: Yeah.

8 COMMISSIONER O'CONNELL-DIAZ: -- as opposed to
9 what the meat of the sandwich is, which I believe is
10 the case that's ongoing and I believe you're alluding
11 to testimony in that case. So can you help me
12 understand the key to your position --

13 MR. GIORDANO: The key is there, like you, an
14 excellent administrative law judge, an excellent
15 administrative law judge here, Judge Wallace, dealt
16 with this issue that I'm raising of whether an
17 auction process, assuming one is approved in some
18 form, should be conditioned on the imposition of a
19 more formal or comprehensive review process than the
20 one proposed by ComEd by finding that this issue
21 involves mixed questions of fact and law that can be
22 addressed by the parties during the proceeding, which

1 is maybe what you were thinking.

2 While BOMA -- we respect the judges's
3 reasoning, but we believe that the question of
4 whether the Commission can give up its authority to
5 investigate the reasonableness of charges resulting
6 from the auction is solely a legal issue. And that's
7 why we believe it's appropriate for you to deal with
8 it here to dismiss ComEd's tariffs and have them
9 re-file those tariffs in a manner that doesn't ask
10 you to give up that authority to make and
11 after-the-fact review of the reasonableness of the
12 charges.

13 Since this is the first time that
14 charges for consumers in ComEd's service territory
15 will be determined in this manner, BOMA believes that
16 now is not the time for the Commission to give up any
17 of its authority to investigate ComEd's rates.

18 As you know, Chairman Hurley
19 suggested, and he's correct that we proposed through
20 Dr. Arthur Lauper, an alternative method of the
21 auction. We believe that a properly-structured
22 auction could possibly result in reasonable rates.

1 CHAIRMAN HURLEY: Given your testimony filed by
2 your client, I was a little confused by the position
3 that you're taking. I just want you to stick with
4 the motion to dismiss.

5 MR. GIORDANO: We're concerned that the
6 Commission shouldn't approve a tariff which removes
7 the back-stop of the Commission's traditional
8 authority to investigate the reasonableness of the
9 charges stemming from the auction.

10 Whatever --

11 COMMISSIONER O'CONNELL-DIAZ: But,
12 Mr. Giordano, wouldn't you agree that the market --
13 the rate that comes out of this auction is just one
14 of the components of the overall rate that will be
15 charged to a customer?

16 MR. GIORDANO: Yes. Absolutely.

17 COMMISSIONER O'CONNELL-DIAZ: And the
18 Commission will make a review of that?

19 MR. GIORDANO: They will be able to review
20 delivery charges, but they won't be able to review
21 supply charges under this proposal.

22 So we're concerned, for example, what

1 if the auction results happen. And everything
2 happens supposedly by the book. I mean, this is the
3 first time we've done this. And auction results come
4 out 50 percent higher than forward wholesale market
5 prices at the time. The way we read ComEd's tariffs,
6 you couldn't do anything about it because you would
7 only be able to determine whether or not the auction
8 rules were followed.

9 This is particularly important because
10 ComEd's affiliate elects Exelon generation, and the
11 electricity suppliers appearing today will benefit if
12 electricity supply charges from the auction are
13 higher than market prices.

14 COMMISSIONER O'CONNELL-DIAZ: Well,
15 Mr. Giordano, going back to some questions that
16 Commissioner Wright asked of one of the earlier
17 respondents. I don't recall which one, but it was
18 with regard to the FERC situation. And wouldn't that
19 just force Ameren and ComEd to go to market without
20 us having any control if we granted the motion to
21 dismiss?

22 MR. GIORDANO: I don't think so.

1 I mean, I don't know what ComEd would
2 do. But one scenario would be they would re-file
3 with a different approach related to your authority
4 to review the auction, and you would maintain a
5 post-prudent review.

6 CHAIRMAN HURLEY: You would agree, given the
7 testimony that you filed in this docket on behalf of
8 BOMA, that the proceedings contemplate the
9 possibility of alternatives since you filed one in
10 evidence?

11 MR. GIORDANO: Yes, sir.

12 CHAIRMAN HURLEY: Okay.

13 MR. GIORDANO: But we just are concerned. We
14 don't want the Commission to give up any of its
15 review authority.

16 And that relates to the second
17 question that you asked. And I think we're in
18 agreement with Commission and Staff and ComEd, I
19 think on this point, that it seems like they're
20 saying the legislature in '97 did not make a
21 determination how rates should be set post-2006.
22 They just didn't decide that. Okay?

1 But they also said in 16-103 that
2 nothing shall be construed to approve, allow or order
3 modifications in to -- you should never read from a
4 statute.

5 I'm just about done. I appreciate
6 your time here.

7 They say in 16-103(a) that nothing in
8 the subsection shall be construed as limiting an
9 electricity utility's right to propose or the
10 Commission's power to approve, allow or order
11 modifications in the rates, terms and conditions for
12 such services pursuant to Article 9 or Section 16-111
13 of this Act.

14 So we think Section 16-111 that
15 Mr. Townsend referred to is additional authority.
16 That you still have the full authority to investigate
17 the reasonableness and prudence after the fact of
18 the --

19 COMMISSIONER O'CONNELL-DIAZ: Are we to ignore
20 Section 16-111(i) then?

21 MR. GIORDANO: No. It's something you have to
22 look at in determining reasonableness and prudence.

1 You have to look at whether the charges are more than
2 10 percent above the market. And we disagree with
3 ComEd and the suppliers on how you determine the
4 market. But that is something that is beyond the
5 scope of this auction -- or this motion to dismiss.

6 Thank you.

7 CHAIRMAN HURLEY: Thank you, Mr. Giordano.

8 Any other questions?

9 Mr. Jim Monk is here on behalf of
10 Illinois Energy Association.

11 Good afternoon.

12 MR. MONK: Thank you, Mr. Chairman. Members of
13 the Commission, it's a pleasure to be with you today.

14 Thank you for the opportunity to be
15 with you today. You might wonder why I'm here
16 because I don't often tread on these grounds of
17 docketed proceedings. And I asked myself that, as
18 well.

19 One of the reasons is the importance
20 of this situation. Another reason may well be that
21 I've been around these issues for so long, since day
22 one or before day one. I remember the Hollow

1 Building (phonetic). I know how to find Orland Park.
2 I've seen a lot of this as have several other people
3 in the room. I've seen a lot of this develop, and I
4 have a great personal interest to make sure it
5 develops properly for the best interest of not only
6 our members, but for the interest of the people of
7 Illinois. And another reason is because the
8 organization I represent is relatively unique.

9 We have not only local distribution
10 utilities. We have traditionally vertically
11 integrated companies like MidAmerican Energy and the
12 like, and we also have as members, associate members,
13 independent power suppliers.

14 So we run the gamut of the energy
15 industry here in the State of Illinois, and as such,
16 we are very interested as a group and association in
17 how these matters proceed.

18 I certainly don't want to reiterate a
19 lot of the points that have been made today. I would
20 like to emphasize three key things, then raise the
21 questions the Chairman raised at the start of the
22 proceeding.

1 First, since the utilities no longer
2 own generation assets, it seems to me the movant's
3 argument would preclude setting rates based on costs
4 incurred. So the only means available to them for
5 obtaining power supply and that is being third-party
6 suppliers. I certainly don't think that's what the
7 General Assembly had in mind. I don't know where
8 this leaves us. And I don't think that that's a
9 place that leaves us in a place that the General
10 Assembly wanted us to be back in 1997 when all this
11 was put together.

12 Secondly, the legality of using
13 formulae to establish rates is well-established here
14 in Illinois. And the proposed tariffs, provide the
15 Commission with the oversight ability of the auction
16 process, as well as, the opportunity, the ultimate
17 opportunity, to prevent the implementation.

18 I think that's where I disagree with
19 what I heard several times here today with the term,
20 "automatic pass-through."

21 I don't think this situation provides
22 an automatic pass-through because there is nothing

1 automatic about the ultimate authority lying with you
2 as the Commission to set aside the results of
3 whatever the auction provides.

4 Thirdly, I think it at best the
5 movant's argument is premature given the many
6 questions of law and fact that still need to be
7 addressed by the parties during the course of this
8 action.

9 For a finder of fact to dismiss a
10 proceeding at this stage, it must be clear that no
11 set of facts can be proven which will entitle the
12 petitioning party to the relief sought. I think it's
13 far too early in this particular process to reach
14 that legal conclusion.

15 So your -- Mr. Chairman, your two
16 questions. I was involved in the post-2006 process
17 as a convener. I actually did pinch-hit for
18 Mr. Vight (phonetic) one time on the power
19 procurement process, and was so overwhelmed by the
20 process that I beat a path back to the LIHEAP issues
21 and never strayed.

22 And those of who you know the LIHEAP

1 issues, those can be pretty contentious as well. I
2 co-convened the LIHEAP working group and was pleased
3 to be involved in that process.

4 So I don't really have an inside
5 knowledge of what the power procurement conclusions
6 are. I read them, but I wasn't involved directly
7 except for that one long, long afternoon in the
8 process itself.

9 I did want to speak to one particular
10 thing and that I don't think has been directly or
11 raised to the concerns of the intent of the General
12 Assembly.

13 And that deals with I think --

14 CHAIRMAN HURLEY: You were around in '96,
15 weren't you?

16 MR. MONK: Oh, yeah. I was around in '95, '94.

17 (Laughter.)

18 I took this job in December of 1993.
19 And I was assured I would have summers off, which
20 didn't work out.

21 (Laughter.)

22 The other thing that happened, if some

1 of you historians may recall, about March of 1994, I
2 had been in the job for three months, and California
3 decided to open this blue-book process, and my life
4 has never been the same. And I think a lot of
5 people's lives in this room has never been the same
6 since the notorious blue book was opened.

7 But at any rate, I think the intent of
8 the General Assembly was, I think, in fact, as stated
9 in the preamble was to move to competitive markets
10 and provide benefits to consumers of all classes here
11 in Illinois.

12 Obviously, some have benefited sooner
13 than others. But I think what we have here through
14 the auction process or whatever competitive bidding
15 process comes out of this proceeding, what we have is
16 the opportunity to include those who might not
17 otherwise be included; i.e., the residential and
18 small business class in terms of receiving the
19 benefits of this particular process that we've all
20 embarked on.

21 I think we bring benefits through the
22 wholesale market process to those who might not

1 directly benefit from it otherwise by developing a
2 viable process, and I think that's what this
3 Commission is all about. And I think it would be a
4 shame to end that prematurely.

5 I would be glad to try to answer any
6 other questions.

7 CHAIRMAN HURLEY: I have a question that might
8 be appropriate to you.

9 In 2003, you may recall at the General
10 Assembly extended the period of time or shall we say
11 extended the rate freeze, if you will, from what
12 was --

13 MR. MONK: We like to say extended the
14 transition.

15 CHAIRMAN HURLEY: Extended the rate freeze.
16 It's semantics.

17 MR. MONK: It's one and the same.

18 CHAIRMAN HURLEY: Well, we all understand what
19 we're talking about.

20 Because I came to the Commission in
21 1999, and anticipated that we would be doing this
22 process actually in 2004, and then in 2003 the

1 legislature extended it.

2 Do you remember the rationale for the
3 extension of the rate freeze? I know you stand
4 around the rail a lot.

5 MR. MONK: I lean on the rail. That marble is
6 really difficult to lean on.

7 Actually I had a chance to kind of go
8 back over the rationale because Representative Lynch
9 (phonetic) had a little bill this spring that would
10 have extended the transition another two years, and I
11 was able to testify in the hearing on that bill.

12 The question came up then and the
13 difference between that time and this particular time
14 was, essentially, the development of the markets.

15 We, at that point in time, I don't
16 think any of us, at least in my group, was entirely
17 comfortable that the markets had developed such that
18 it would be supportive of where we wanted to be now
19 in 1107.

20 The other thing I think, if you
21 recall, is we weren't very sure of where we were
22 headed at that point in time on RTOs. And that's a

1 major difference of when we extended the rate freeze
2 and transition the first time and why we as an
3 industry proposed it this spring because we felt like
4 we were positioned -- well, in both respects from and
5 with RTO standpoint with and PGN myself, and on the
6 other hand we felt that the markets, especially the
7 markets that were developed because of those RTOs was
8 much more robust, much more viable now than it was.

9 We were all, frankly, I think a little
10 more concerned if we went forward on the original
11 time-table what would happen in terms of how the
12 market would develop and how it would service where
13 we were trying to go.

14 And I think a lot of us have a much
15 more higher comfort level now because of mainly those
16 two developments.

17 CHAIRMAN HURLEY: Thank you.

18 Any other questions for Mr. Monk?

19 And our last speaker is Myra
20 Karegianes on behalf of Constellation Energy
21 Commodities Group.

22 MS. KAREGIANES: Good afternoon, Chairman and

1 Commissioner.

2 CHAIRMAN HURLEY: Former general counsel for
3 the Illinois Commerce Commission.

4 MS. KAREGIANES: I represent Constellation
5 Energy Commodities Grouping, Constellation provides
6 wholesale procedure and risk management services to
7 distribution utilities, co-ops and municipalities and
8 other large load-serving entities.

9 First of all, let me say that almost
10 everybody has made all the arguments. So there is no
11 reason for me to repeat everything. I'll be very
12 short and very sweet.

13 CHAIRMAN HURLEY: We like that.

14 MS. KAREGIANES: Constellation is very
15 involved in both the ComEd and Ameren dockets and
16 participated in the Commission's post-2006
17 initiative.

18 As to the post-2006 initiative, I
19 believe that the reports that have been circulated
20 and on the web speak for themselves as to what that
21 process was and the consensus and the like.

22 ComEd and Ameren, as you know, each

1 propose respective tariffs to have an auction for the
2 procurement of full requirement generation service to
3 serve their bundled customers.

4 As proposed, the auction process would
5 be conducted by an independent auction manager and
6 the Commission would have an opportunity for a
7 post-auction review of the process.

8 Constellation has supported and
9 continues to support the auction structure proposed
10 by ComEd and Ameren and believes the Commission has
11 the authority to approve the auction structure.

12 There is no dispute that the utilities
13 are entitled to recover their prudently incurred
14 costs.

15 Their generation is no longer with the
16 utilities. They have to buy it from somewhere. And
17 what is being proposed is a competitive bidding
18 process whereby the lowest bidder would, essentially,
19 get to sell to ComEd and to Ameren. And then those
20 costs that are through this competitive bidding
21 process are prudently procured would be the costs
22 that are part of the rate that ultimately goes down

1 to the retail customers.

2 The Commission -- there is also no
3 dispute that the Commission has authorized over the
4 years various mechanisms for the recovery of a
5 utility prudently incurred costs.

6 And Mr. Giordano talked earlier about
7 the City of Chicago case where back in 1958 the
8 Supreme Court affirmed a Commission decision
9 approving a mechanism that permitted a utility
10 automatically to increase its rates to recover the
11 costs of the wholesale purchase of power. That was
12 ultimately qualified in what is now the purchase
13 clause, the FAC and the like.

14 The Commission had the authority then.
15 It had the authority when it did the coal-tar
16 clean-up to have different mechanisms for passing
17 through those prudently incurred costs.

18 And this is no different. It is
19 simply a competitive bidding process whereby there is
20 a cost associated with buying the power and energy
21 and that cost is prudent.

22 The authority exists in Article 9.

1 Nothing has taken away Article 9 from the Illinois
2 Commerce Commission from day one to set just and
3 reasonable rates. It exists in Section 16-111(i) and
4 people, various proponents, earlier discussing great
5 detail 16-111(i) as well as 16-112.

6 Nothing in any of the amendments to
7 the Public Utilities Act including Article 16 has
8 taken away the Commission's authority to set rates
9 that are prudent or to determine how or what the
10 mechanism is for setting those rates.

11 Thank you.

12 CHAIRMAN HURLEY: I have a question for you.

13 MS. KAREGIANES: Yes.

14 CHAIRMAN HURLEY: Since you are a former
15 long-term general counsel for the Commission and I
16 proposed it earlier.

17 Assume for the sake of argument the
18 Commission were inclined to grant the motion to
19 dismiss, what would become of the tariffs?

20 MS. KAREGIANES: One thing to become of the
21 tariff is very well going to go into effect.

22 The tariffs are filed. There is an

1 11-month clock. At the end of that 11-month, if
2 there is no action by the Commission, the tariffs
3 become law. Somebody else suggested earlier that
4 perhaps the tariffs would be withdrawn or that
5 something else would happen.

6 CHAIRMAN HURLEY: I believe we've all seen, and
7 you may recall at the Commission, as I do recall back
8 in the '80s that there were a couple of times when
9 the Commission asked companies to withdraw and
10 re-file their tariffs. I recall that.

11 The Commission urged, if you will,
12 because the company had wanted some additional time.

13 In other words, legally, I'm looking
14 to you to give me the legal answer, if you can. I
15 know it's a tough, legal, technical question.

16 MS. KAREGIANES: Legally the tariff is filed,
17 and it goes into effect with the Commission in the
18 end modifying that tariff or somehow --

19 CHAIRMAN HURLEY: On its recent suspension
20 date.

21 MS. KAREGIANES: And determining somehow it is
22 not just and reasonable and modifying it in a way

1 that it does something other. But to just dismiss it
2 outright without looking at the merits --

3 CHAIRMAN HURLEY: You would dismiss the
4 proceeding. I'm talking about the tariff that would
5 be filed because these are tariffs filings.

6 MS. KAREGIANES: I don't see how you dismiss
7 the tariffs.

8 CHAIRMAN HURLEY: Thank you.

9 COMMISSIONER FORD: I just have a comment.

10 October 23rd, our general counsel
11 advised us that it is within the Commission's
12 authority to review a competitive procurement process
13 driven tariff such as tariffs filed that have been
14 filed by ComEd.

15 CHAIRMAN HURLEY: Ms. KK, thank you.

16 I believe that the Attorney General
17 asked for some rebuttal time.

18 Would you still like that?

19 MR. WEINBERG: Thank you, Mr. Chairman.

20 CHAIRMAN HURLEY: I believe the only parties
21 that asked for rebuttal were Mr. Rippie and
22 Mr. Flynn.

1 MR. GIORDANO: We would like rebuttal. My
2 co-counsel said we have two minutes.

3 CHAIRMAN HURLEY: Okay.

4 COMMISSIONER O'CONNELL-DIAZ: We waited
5 two minutes for you.

6 CHAIRMAN HURLEY: Some things never change.

7 MR. WEINBERG: Mr. Chairman, Members of the
8 Commission, I have had, as you have, many hours now
9 to listen to the presentations that followed mine.

10 And I think it is crucial for the
11 Commission to keep in mind that our petition for
12 interlocutory review is addressed to the pure legal
13 issue of whether the statute of the Public Utilities
14 Act authorizes the Commission to approve the auction
15 as described in the riders.

16 Now this issue is a pure issue of law
17 because it is a matter of statutory instruction. And
18 we have shown by Section 103-C, the plain language of
19 103-C does not authorize the Commission to approve
20 the riders.

21 And the reason this is is to quote
22 with no disparaging intent at all to quote the

1 Chairman's words that this is huge. This is a huge
2 change.

3 Now, I sat here and I heard Mr. Rippie
4 argue that there is no difference between cost-based
5 and market-based price. These are just the costs
6 that we're going to have to pay.

7 I heard Mr. Townsend come back and
8 say, This is actually market-based prices, and that's
9 okay.

10 But the reality is that there is a
11 huge difference between market-based prices and
12 cost-based prices.

13 Cost-based rates are rates that are
14 determined through the regulatory process. They're
15 based on a prudently incurred cost of serving the
16 customers with a reasonable rate of return. That's
17 what the Commission has been in the business of doing
18 for years.

19 Market-based rates are different.
20 Market-based rates will be determined by the market.
21 Now, several people have said, Well, that's all
22 right. There can be full prudence review. There

1 will be full prudence review of the costs that are
2 produced by the auction.

3 Well, first of all, that certainly is
4 not at all what is being proposed in the riders. In
5 fact, after wading through pages and pages of briefs
6 while watching a July 4th parade, I read over and
7 over that if the Commission were actually going to
8 impose full prudence review of management provisions,
9 utilities would fold up and say, No, that's not a
10 workable proposal for an auction.

11 But if, if you move from cost-based
12 rates, which we submit 103-C does not permit you to
13 do for services that have not been declared
14 competitive, the reason it will be huge is what will
15 be lost is that consumers will lose rates based on
16 the review of prudence of management positions.

17 Consumers will lose rates determined
18 through public proceedings with procedural safeguards
19 that ensure the rights of citizens to participate,
20 investigate, present evidence and cross-examine
21 witnesses as set forth in the Commission's rules.
22 This is what's been happening for years and years and

1 years. And there is a change proposed.

2 COMMISSIONER O'CONNELL-DIAZ: Mr. Weinberg,
3 would having the FERC determine what that is afford
4 the citizens the opportunity to participate in the
5 proceedings?

6 MR. WEINBERG: I don't know if it would.

7 But that is not the result.

8 COMMISSIONER O'CONNELL-DIAZ: What is the
9 result of granting your motion?

10 MR. WEINBERG: Well, has Mr. Vight (phonetic)
11 said, the intervenor, who has the authority to
12 address what is going to happen now? Is it in the
13 Commerce Commission or is it in the legislature?

14 We would submit there is no authority
15 in the Act for the Commission to do this.

16 COMMISSIONER O'CONNELL-DIAZ: What are you to
17 say of Section 16-111(i), are we to ignore that?

18 MR. WEINBERG: No. In fact, Section 111-(i)
19 shows the General Assembly contemplates that the
20 Commission, the Commission would be setting the
21 rates, not the market.

22 The Commission while going through its

1 prudence review can compare, can compare the tariff
2 rates, the traditional tariff rates, with the market.
3 But it's the Commission that is setting the rates.

4 And in cost-based rates --

5 COMMISSIONER O'CONNELL-DIAZ: What is the
6 market value of that? What is that?

7 MR. WEINBERG: What is the market value?

8 COMMISSIONER O'CONNELL-DIAZ: Auh-huh.

9 MR. WEINBERG: It depends at the time.

10 COMMISSIONER O'CONNELL-DIAZ: That is a term
11 that is used in this provision of the statute.

12 MR. WEINBERG: Right.

13 If you will apply to provisions 112
14 and we will determine what the market value is.

15 But the Commission while going through
16 a cost-based rates procedure will determine that.

17 So it's a huge change that is being
18 proposed, and the position of the joint filers is
19 that the Public Utilities Act does not authorize the
20 Commerce Commission to approve such a change.

21 Thank you.

22 CHAIRMAN HURLEY: Thank you, Counsel.

1 Mr. Rippie.

2 MR. RIPPIE: Thank you, Mr. Chairman.

3 Briefly commenting to some of the
4 concerns that Mr. Giordano raised.

5 We have proposed a rider that provides
6 a great deal of consumer protection. It gives you,
7 the Commission, and all the participants an
8 opportunity to participate in the process that the
9 petitioners want to determine before the fact.

10 It gives Staff and the participants
11 the opportunity to present to the Commission with a
12 great deal of information, not just two reports about
13 what is going during the auction development process
14 in the auction. It gives you the opportunity to
15 reject the auction if you determine there were
16 procedural irregularities or if you determine that
17 that price is not appropriate at the time. And you
18 get to do that by initiating a proceeding.

19 I invite you to read the tariff. You
20 will not find the limitations that Mr. Giordano
21 refers. Nor will Mr. Giordano be able to explain
22 legally how it will be lawful under either state

1 prudence law or federal energy law for you to, after
2 the fact, reverse or review a price that at the time
3 was just and reasonable and that was established
4 through just and reasonable process.

5 Nor will they be able to explain how
6 if riders were not authorized by Article 9, we have
7 Rider TS, Rider ISS, Rider IDD, Rider PR, the cost
8 recovery riders for a variety of other costs which
9 utilities, in fact, incur.

10 The important point, though, that I
11 come back to is this, and I was I guess jealous of
12 Mr. Townsend's visual aids so I'm going to use one.
13 I'm No. 123. So here they are in my view.

14 Number one, this is a motion to
15 dismiss.

16 (Laughter.)

17 MR. WEINBERG: I had 168.

18 MR. RIPPKE: No. 1, this is a motion to
19 dismiss. And the question is whether there is any
20 set of facts under which these tariffs can be
21 approved or set of facts that might be developed
22 during the course of the proceeding, and there

1 clearly are.

2 Number two is focus on the law and
3 authority it grants you. Article 9 permits you to
4 allow us to recover our costs including the riders.

5 16-111 directs you in exactly the
6 circumstance that we are dealing with; to focus on
7 the market value, power and energy, which is
8 precisely what the tariff determines.

9 And Section 16-112 provides for
10 methods for determining that, which this tariff
11 certainly meets.

12 And, No. 3, 16-103 does not talk about
13 this situation. It talks about what, as Mr. Flynn
14 said, is permitted and is not permitted once someone
15 is declared competitive.

16 To close, the use of market-based
17 prices is not inherently inconsistent with the
18 principle of setting rates, components and costs when
19 the market-based prices are set at a competitive
20 market value.

21 Genuinely competitive market prices
22 closely track costs. Those words were penned by the

1 petitioners.

2 I submit that the evidence is going to
3 show that they are true. And for that reason, the
4 petition should be denied.

5 CHAIRMAN HURLEY: Thank you, Mr. Rippie.

6 Mr. Flynn?

7 MR. FLYNN: A couple very quick points.

8 First, Mr. Weinberg said correctly
9 they present the Commission with a pure legal issue.

10 And you have to interpret a statute.

11 Well, one of the basic rules of statutory
12 construction is that we read statutes to make sense
13 and not reach ridiculous or unreasonable results.

14 We don't check our common sense at the
15 door. And any interpretation of the statute that
16 leaves the utilities without a legal procurement
17 method is not reasonable, and certainly not one you
18 should adopt.

19 Secondly, Mr. Weinberg stressed the
20 need for a review of the -- by the Commission of the
21 cost of the power that's procured. Well, that's
22 certainly what we are proposing, is a process by

1 which the market is invited to come in and bid.

2 If the market chooses to come in,
3 doesn't choose to come in, those who are willing to
4 come in and make their best bid, that's what the
5 reverse auction is designed to do. Then you either
6 accept or reject the result.

7 What review is he talking about when
8 he talks about reviewing the costs? These are the
9 costs. This is the best deal we can get from the
10 market. If he's suggesting somehow you can take
11 individual's wholesale suppliers and investigate what
12 their costs are and whether their result in charges
13 are reasonable, that's not your job. And the General
14 Assembly can't make it your job because that's the
15 FERC's job.

16 So I don't know what review is lacking
17 from that.

18 Thank you.

19 CHAIRMAN HURLEY: Thank you.

20 COMMISSIONER FORD: Let me just see if I can
21 say this: ComEd comes in, filed a proposed tariff,
22 whether that tariff meets the requirements of

1 16-112(a) is left up to us. But we have to have a
2 hearing before we can determine that. Is that not
3 true?

4 CHAIRMAN HURLEY: Are you asking me the
5 question?

6 COMMISSIONER FORD: Yes.

7 CHAIRMAN HURLEY: I'm not answering that.

8 You can ask that question to a party.

9 COMMISSIONER FORD: I would like to ask that
10 question to the AG..

11 MR. WEINBERG: I'm sorry.

12 COMMISSIONER FORD: ComEd proposed a tariff
13 pursuant to Section 16-112(a) whether those tariffs
14 meet the requirements of 16-112(a), the tariff would
15 define the determination of the market value of
16 retail electricity and energy and the customers that
17 would buy this. That's an as a matter of fact.

18 But the Commission can only make that
19 determination after reviewing all the evidence and
20 briefs in the matter following a hearing. Is that
21 not true?

22 We couldn't make a decision? I think

1 Mr. Monk summarized it when he said, We put the horse
2 before the cart because we have to hear the facts and
3 the evidence before we can actually make a
4 determination on that hearing.

5 Didn't you say that this is not --

6 MR. WEINBERG: I would say that is not correct.

7 And the reason it's not correct is if
8 the statute doesn't authorize you to make a certain
9 decision, then you don't need to have a hearing in
10 order to figure out what the underlying facts are.

11 If you know just by looking at the
12 facts that ComEd is saying how it's going to work,
13 and you still -- and you're not authorized to do
14 something, then you don't need to have a hearing.

15 COMMISSIONER FORD: We don't have to have a
16 hearing to make sure that they meet the requirements
17 of what they are asking?

18 MR. WEINBERG: No. If the statute -- if the
19 law doesn't authorize you to bless this, a
20 competitive procurement method, when for customers
21 whose service has not been declared competitive, then
22 it doesn't matter what it would look like because the

1 statute doesn't allow it.

2 COMMISSIONER FORD: I'm simply following what
3 my general counsel has opined, that we had the
4 authority, and that's why I cited that.

5 CHAIRMAN HURLEY: Mr. Giordano, very briefly
6 please.

7 MR. GIORDANO: Thank you.

8 CHAIRMAN HURLEY: How many members are there at
9 BOMA?

10 MR. GIORDANO: 270.

11 CHAIRMAN HURLEY: How many of them take utility
12 service from the utility and how many take utility
13 service from an ARES?

14 MR. GIORDANO: I don't know the precise answer.
15 I know that very many are still taking
16 public utility bundled service or PPO service. I
17 mean, it's definitely the majority.

18 But the BOMA members that are not
19 taking service from the utility believe that the
20 auction price will affect the price in the retail
21 market.

22 Like right now there is a situation

1 where the bundled service options and the PPO, you
2 have to be competitive against those if you're a
3 competitive supplier.

4 So BOMA believes that the auction
5 price if it's approved as the only ComEd option will
6 be significant for the price in the retail market.

7 So it affects the purchasers that are
8 buying from ComEd bundled supply and delivery, but it
9 also affects the purchasers that are in the
10 competitive market.

11 COMMISSIONER O'CONNELL-DIAZ: That would be
12 testimony that you're filing in a proceeding
13 currently before us, correct?

14 MR. GIORDANO: Yes. But I was just responding
15 to Chairman Hurley's question on that.

16 We appreciate that ComEd has clarified
17 the Commission's authority. We didn't read the
18 tariffs that way, that ComEd -- I mean, that the
19 Commission would have the authority to look at the
20 price, the price itself coming out of the auction and
21 compare that with the forward wholesale market prices
22 at the time. That -- at that time. We are talking

1 about at that time.

2 We are not talking about looking back
3 six months later and saying, You know, prices have
4 dropped. Those prices are no longer reasonable.

5 We're saying that at the time, you
6 need that authority to look at that auction. It's a
7 leap of faith to know that this auction is definitely
8 going to work. And you need to look at whether or
9 not those prices are reasonable when you look and
10 open an investigation if you believe that they're
11 not. And that is critical that that happen here.
12 And it's critical that you have the information to
13 make that judgment.

14 The only other comment I make is I
15 think Commissioner O'Connell-Diaz raised the issue
16 about the difference between FERC signing-off that
17 charges are reasonable, and the ICC, the State
18 Regulatory Commission making that judgment.

19 And in the Pike County case in
20 Pennsylvania, the Court held that the Commission did
21 not abuse its discretion, the State Commission when
22 in making a reasonable comparison of the utility's

1 purchased power expense with alternative purchase
2 power costs, it chose to compare utilities data with
3 alternative information during the same test period.

4 So just because a cost, a supply cost,
5 is reasonable under FERC law, that doesn't mean that
6 you have to necessarily determine that that's a
7 reasonable charge to be passed on to consumers.

8 The case law is clear on that point.

9 I appreciate the opportunity.

10 CHAIRMAN HURLEY: Thank you, Mr. Giordano.

11 The presentations are completed.

12 Additional questions of the
13 Commission?

14 COMMISSONER WRIGHT: Mr. Chairman, I have no
15 questions, just a couple comments and requests.

16 One comment is thank you for
17 scheduling these oral arguments. I do find them to
18 be quite helpful and bring clarity to the issue
19 before us.

20 Two, to the parties recognizing to the
21 parties despite the extremely short time frame,
22 certainly did not compromise the quality of the

1 arguments made today. I very much appreciate those.

2 And then to my request, I would
3 request that our chief clerk and Chairman that the
4 transcript of today's oral arguments be made
5 available in a reasonable time for the Commissioners
6 to look at them.

7 CHAIRMAN HURLEY: I suspected that Commissioner
8 O'Connell given the compliment that was paid her by
9 Mr. Giordano that she would want same-day copy.

10 COMMISSONER WRIGHT: That would be wonderful.
11 Then I could bring it back to Springfield, which I'm
12 doing tomorrow.

13 If we could have the transcript of
14 today's oral argument as soon as possible. Before it
15 becomes an agenda item.

16 CHAIRMAN HURLEY: I don't really know how that
17 works. I will have somebody take it up with the
18 court reporter.

19 Is that all you have?

20 COMMISSONER WRIGHT: Yes.

21 CHAIRMAN HURLEY: Other questions?

22 Commissioner Lieberman? You're oddly silent.

1 COMMISSIONER LIEBERMAN: I don't think it's
2 odd.

3 CHAIRMAN HURLEY: I want to concur with my
4 colleague, Commissioner Wright. Everybody did a good
5 job. The arguments were precise. They pretty much
6 stayed to the point, not totally to the point. But
7 we get a lot of that at the Illinois Commerce
8 Commission.

9 Thank you for your time. Thank you
10 for coming in. Again, I'm sorry, it's the day after
11 the holiday. I've taken enough abuse for that.

12 And this matter is under advisement
13 with the Commission.

14 And we will adjourn for today. We
15 will be in session tomorrow morning at 10:00 o'clock.

16 Thank you.

17

18

19 (Whereupon, this session of
20 Oral Arguments were adjourned.)

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